Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES DOUGLAS BOSWELL PETITIONER

VS

TEXAS CHRISTIAN UNIVERSITY RESPONDENTS
WILLIAM E. TUCKER, DR CHANCELLOR
MICHAEL D. MCCRACKEN DEAN,

ON PETITION FOR A WRIT OF CERTIORARI TO THE

U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH
USDC No. 4:98 - CV-168-Y, Fifth Circuit N0 99-10161

PETITION FOR A WRIT OF CERTIORARI

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130 PP

Questions Presented

Case law is clear that the military and military technicians are not entitled to title VII protection, including retaliation. is this correct?

Is a military service member and/or military technicians afforded equal protection from the law concerning whistle blower, discrimination and retaliation activity?

Is a private university governed by the vicarious liability rule to unlawful harassment on an all covered basis?

A private University is in receipt of federal and/or state funding and is subject to federal and/or state oversight. Is the university subject to federal and state whistle blower, tort, and discrimination law, and is it subject to the same remedy and accountability as a government entity?

Are there systemic shortfalls with investigation, adjudication, and remedy when a service member or military technician reports a protected disclosure of a violation of regulation, policy, and law?

Is a private university in a DoD agreement and in receipt of federal funds required to have any legal justification or excuse to request reassignment or to retaliatory discharge a DoD employee?

Does the lack of enforcement of laws concerning provisions of state and federal civil rights, retaliation, and whistle blower law have a negative effect on our nation?

CERTIFICATE OF LIST OF PARTIES

Number of the case and style Appellate Civil Action 99-10161 Boswell v. Cohen Whistle Blower and Federal Discrimination Case based on retaliation.

USDC No. 4:98 - CV-168-Y

The list of Defendants include:

Texas Christian University

Texas Christian University Chancellor, William E. Tucker

Texas Christian University, Dean Dr. Michael McCracken

The initial list included Defendants:

The Secretary of Defense, Honorable William Cohen

The former Secretary of the Army, Honorable Togo West, (Now replaced by Louis Caldera)

The National Guard Bureau Chief Lieutenant General Baca (now replaced by Lieutenant General Davis)

Texas Christian University

Texas Christian University Chancellor, William E. Tucker

Texas Christian University, Dean Dr. Michael McCracken

The ones italicized are dismissed.

TABLE OF CONTENTS

COVER PAGE	i
QUESTIONS PRESENTED	ii
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v-xii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	6
ARGUMENT	10
REASONS FOR GRANTING THE PETITION	40
CONCLUSION	40

INDEX TO APPENDICES

APPENDIX A United States court of appeals opinion - for rehearing en banc
APPENDIX B United States court of appeals opinion - denial of the appeal
APPENDIX C United States district court opinion - summary and final judgment
APPENDIX D United States district court opinion - letter with selective pages
APPENDIX E United States district court opinion - denying motions to
(1) reopen the case
(2) for relief from summary and final judgment
(3) to file supplemental pleading
(4) for court-appointed attorney and
(5) for continuance in form of forma pauperis.
APPENDIX F Supplement to Jurisdiction
APPENDIX G Tort statutory provisions
APPENDIX H Constitutional provisions
APPENDIX I Agency orders, opinions and materials to the understanding of the case
APPENDIX J Proof of Service

Court Cases

	Page number
Weidman v. Wal-Mart Stores Inc, 141 F.3d 1453 (llth Cir 1998).	2
Bob Jones University v United States, 461 U.S. 574.	11
See K. V. MartCo., 173 F.3d at 1223; Creative Tech., Ltd. v. Aztech Sys.PTE, Ltd., 61 F.3d 696, 699 (9th Cir. 1995).	
Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).	12
(Writ Of Certiorari To the 4th Circuit United States Court of Appeals No 99-5, In the Supreme Court of America: Brzonkala v. Virginia Polytechnic and Antonio Morrison).	13
United States v. Carpen F.2d 824, 828 n. 3 (9th circuit 1992).	14
Haddle v. Garrison	14
Nixon v. Warner Communications, Inc, 598-99 (1978);EEOC v. Erection Co., Inc., 900 F.2d 168, 169 (9th Cir. 1990).	15
James, 6 F.3d at 238; see also Doe v. United Services Life Ins. Co., 123 F.R.D. 437 (S.D.N.Y.1988)	15
Seattle Times v. Rhinehart	16
Does	18
Gomez, 60 F.R.D. at 107. In Boswell	18
Ellison vs Conner and Department of the Army Corps of Engin. (5cir No.97-30359, NO 98-30203, Sep11,1998)	21
Texas Dept. Human Resources v Green No. 3-92-059-CVTex.App. Austin,1993,nw.h at pg 8.	23
Taylor v Charter Medical	24
Milonas v. Williams (unpublished).	24
Stoneburner vs Secretary of the Army (W. District 97-50765),	24
Government Fin. Servs v. Peyton Place, inc 62F.3d 767,772 (5cir.1995).	25
Searcy v. Phillups Electronics North America Corp., 117 F.3d at 221 (5th Cir. 1997).	27
Indest v. Freeman, 5th cir. 30 March 1999	27
Burlington Industries, Inc v. Ellerth 118 S. Ct. at 2265	27
Faragher v. City of Boca Raton 118 S.Ct. 2283-84	
Indest v. Freemon	27
Alabama Power Co. v Davis (S.Ct.1977). 38 U.S.C.	30
Rice v. United States 5th Cir, 1980, 630 F.2d. 1068	32
Broudy v. United States , 9th Cir . 1981, 661 F.2d 125	32
Kohn v. United States, 2d Cir. 1982, 680F.2d 922.	32
Myers & Myers v. United States Postal Service, 2d Cir. 1975, 527 F.2d 1252, 35 A.L.R.Fed. 466	32
See Prosser and Keeton on torts 6th reprint 1995, p 1055-1066.	32
, Texas Dept. Human Resources v Green No. 3-92-059-CVTex.App.Austin, 1993,nw.h at pg 8.	32
Bay Area Laundry vs. Ferba	37
Louella Nicholas vs the United States,	37
United States v. Kubrick	37
Joseph v. Terminix Int'l Co.,	39
U.S. Bancoorp Mtg. Co. v. Bonner Mall Partnership	39
McDonald v. Delt Air Lines, Inc	39
Gladstone Realtors v. Village of Bellwood, 100 (1979)	39

Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998),	39
Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998),	39
6th U.S. Court of Appeals State of Kentucky vs . Brigadier General Dezarn	F-1
Wirtz v. C & P Shoe Corp., 336 F.2d 21, 30 (5th Cir. 1964)	F-1
Plourde v. Massachusetts Cities Realty Co., 47 F.Supp. 668, 670 (D. Mass.1942	F-1
Alexander v. Gardner-Denver Co (1974)	F-1
Mitchell v. Robert De Mario Jewelry, Inc., (1960)	F-2
NLRB v. Robbins Tire & Rubber Co	F-2
U.S. 9CirDoes v. Advanced Textile 9916713 December 7, 1999-	F-12
Boies v. Raynor, 1961, 89 Ariz, 257,361 P. 2d.1.	G-1
Atkinson v. Dixie Greyhound Lines, 5th Cir. 1944, 143 F.2d 477.	G-2
Cole vrs Adjutant General of Texas (case 493,769 1990)	G-2
Newth vrs Adjutant General of Texas (case 03-93-00516-CV 1992).	G-2
(Wooley v. Hoffman - La Roche, Inc. (N.J. 1985)	G-6
Gertz v. Robert Welch Inc.	G-7
Haswell v. Liberty mutual Insurance Company Mo 1977,557 S.W. .2d. 895.	G-9
Chavez v. Sears Roebuck and Co. 10th Cir, 1975. , 525, F.2d 827.	G-9
Longo v. Reilly , 1955, 35 N.J.Super,405,114 A.2d 302.	G-11
In Woolridge Manufacturing Co. v. United States, 1956, 98 U.S. App.D.C. 286,235F.2d 513, centiorari denied 351 U.S. 989, 76 S. Ct 1054, 100 L.Ed. 1502	G-12
Givhan v. Western Line Consolidated School District (1979).	H-1
Runyan v McCrary 1967.	H-3
Johnson v Railway Express Agency Inc ,	H-3
Angela Moris and Stacy Handley vs. Regents of the University of Colorado No. 96-1555.,	H-4
Gebster. See 118 S.Ct. at 1999".	H-4
In Zentgraf v. Texas A. & M. University, 492 F. Supp. 265 (S.D. Tex 1980),	H-4
City of Garland ("City")	H-5
Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 220 (5th Cir. 1999)	H-6
Essenburg v. Dallas County, 988 S.W.2d 188, 189 (Tex. 1998)	H-6
Gregg County v. Farrar, 933 S.W.2d 769, 775 (Tex. App. -- Austin 1996, writ denied)".	H-6
Pierce v. Texas Dep't of Criminal Justice, Institutional Div., 37 F.3d 1146, 1149 (5th Cir. 1994).	H-7
Stanley v Illinois, 405 U.S. 645 (1972)	H-7
Hodorowski v Ray ID at 651, 844 F.2d 1210, 1216 5th Cir. 1988.	H-7
Click court 970 F.2d at 109	H-7
Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972))	H-7
Bickel v. Burkhart, 632 F.2d 1251, 1255 n.6 (5th Cir. 1980)	H-7
Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 (5th Cir. 1994)(en banc).. at 454 n.8.	H-8
City of Canton, 489 U.S. 378, 388 n.8, 109 S.Ct. 1197, 1204 n.8 (1989)).	H-8
Teague v. City of Flower Mound, 179 F.3d 377, 381 (5th Cir. 1999);	H-8
Brawner v. City of Richardson, 855 F.2d 187, 191-92 (5th Cir. 1988)	H-8
Boddie v. City of Columbus, Mississippi, 989 F.2d 745, 747 (5th Cir. 1993).	H-8
Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976	H-8
Moore v. Otero, 557 F.2d 435, 437-38 (5th Cir. 1977)	H-8
Blackburn v. City of Marshall, 42 F.3d 925 (5th Cir. 1995)	H-8
EEOC and Mary Boyle v. Gallagher Co., No. 98-20351(5th Cir. July 15, 1999)	H-9
In Rhorer v Ratheon Engineers (No. 98-20347), July 15, 1999,	H-9
Under Hansen, 940 F. 2nd 971 5th Cir 1991,	H-10
Varity Corp v. Howe 516 U.S. 489 (1996) at 1077-1079.	H-10
Mead v Johnson Group, 615 S.W.2d, 685 (Tex.1981	H-10
Mawby v U.S. 999, F2d 1252, 1258 (8th Cir, 1993),	H-10

Fadeyi v Planned Parenthood 97-11310 11 Nov 1998	H-10
Sterner v Marathon Oil Company.	H-10
Knowlton v Greenwood Independant School District. (USX Corp., 68 F.3d at 819;	H-10
Dorsey v. Scott Wetzel Serv., Inc 84 Al-Torki, 78 F.3d at 1384).	H-11
Davis v Monroe County Board of Education et al.	H-11
Gebster v. Lago Vista Independent School District	H-11
Guardians Assn. V. Civil Service Comm'n of New York City,	H-11
463 U.S. 582, 598-599 (1983) (opinion of White,J.).	H-11
Honorable Justice O'Conner, in Supreme Court decision	H-11
Davis v Monroe County Board of Education et al.,	
Goss v. Lopez, 419 U.S. 565, 579 (1975).	H-11
10th Circuit Court of appeal No 96-4155 Gunnell v. Utah State College 08/19/1998;	H-12
Von Hoffburg v. Alexander 615, F. 2d 633, 637-38 95th Cir. 1980).	I-5
Cavaliere, 996 F. 2d at 1115).	I-6
Multnohah County, 5.3d at 1263.	I-7
Multnomah Couty v. AC and S, Inc 5 F.3d 1255, 1262 (9th Cir. 1993);	I-7
Lavespere v. Niagara Machine & Tool Works, Inc,. 910 F.2d. 167, 173 (5th Cir. 1990).	I-7
Key Bank of Kuwalt v. Tablecloth Textile Co 74 F. 3d 349, 353 (1st Cir 1996).	I-7
Pretezel & Stouffer, 28 F.3d at 45)	I-8
Enron, 10 F.3d at 96)	I-9
Roxford Foods Inc, 12 F.3d.875,881 (9th Cir 1993)	I-9
N.Y. Life Ins. Co v. Brown , 84 F.3d 137, 141-142 (5th Cir.1996).	I-9
Peyton Place, 62 F.3d at 771):	I-10
Hunter, 66F.3r 1002, 1005 (9th Cir.1995)	I-10
Robinson v. Volkswagenwerk AG, 56 F.3d 1268, 1273-74 (10th Cir.1995)	I-10
Hodges v. Yonkers Racing Corp., 48 F.3d 1320, 1325, (2d Cir.1995).	I-10
Faragher, 118 S. Ct. at 2293.	I-12
Secretary of the Army v. Northrop Worldwide Aircraft Services INC,	I-15
(98-1500) decided September 10, 1999.	
Department of Veterans Affairs vs Gibson, 14 June 1999 No 98-238	I-15
United Teachers v Mackeen and Bailey (94-50503 5th Cir).	I-16
Barrett v. Secretary of H.&H.S., 840 F. 2d 1259,1263 (6th Cir.1987)	I-18
Carteret S. & L. Ass'n V. Jackson, 812F.2d 36, 39 n.6 (1st Cir 1987);	I-18
South mark Prop.v Charles House Corp., 742 F.2d 862, 872 n. 14 (5th Cir.1984).	I-18
Brzonkala in the 4th Circuit United States Court of Appeals No 99-5, Writ Of Certiorari	I-18
Harrison v. Boyd, 765 F.2d 501,503 5th Cir. 1984)	I-18
US Court of Appeals No 99-5 In the SC of Amer Petitioner v. Antonio Morrison	I-18
AMERICAN FLINT Workers Un v. Beaumont Glass Co. 62 F.3d 574, 578	I-19

Statutes and Rules

28 U.S.C. 1254 (1)	1
Federal Rules Chapter 7 A 1.3	2
32 C.F.R & 562.4 (e)	3
Titles IV, V, VI, VII, IX and X	3
Civil Rights Act of 1964	4
18 U.S.C. & 241 and 28 U.S.C.	4
X111 and X1V amendments	4
18 U.S.C. sec 241 and sec 242	4
Fair Housing Act 42 U.S.C. sec 3617	5
Public Law 100-456 was codified at Section 1034 of Title 10, United States Code (U.S.C.)	5
Public Law 100-456	5
Public Law 103-353, Uniformed Services Employment and Reemployment rights Act of 1994,	5
Chapter 43 of Title 38, United States Code	5
102-190 (implemented by Department of Defense 7050.6, September 3, 1992	5
Tex. Rev. Civ. Stat. Ann. Art. 6252-16a (Texas Whistle Blower Act, enacted in 1983)	5
Civil rights under 18 U.S.C. & 241 against conspiracies.	5
Prosser and Keeton on Tort liability sections	5
11 False Imprisonment	5
12 Infliction of Mental stress.	5
36 Violation of Statute	5
91 Interference With Use and Enjoyment of Private Property.	5
92 Breech of Contract.	5
102 Contributory Negligence, Misuse , and other Intervening Misconduct.	5
105 Misrepresentation.	5
111 Defamation.	5
112 Libel and Slander.	5
117 Right of Privacy.	5
119 Malicious Prosecution.	5
121 Abuse of Process.	5
124 Interference with Family Relations.	5
125 Injuries to Members of the Family.	5
130 Inference with Perspective Advantage;	5
Undermining Public Policy, common law of expressed individual contracts	
Texas Education Code, Sec 61.001	7
Title 10 1034 U.S.C.	8
5 U.S.C. 2302b8	9
Freedom And the Court: Civil Rights and Liberties in the United States by Henry Abraham and Barbera Perry page 399,	10
Titles IV, VI, and VII and IX of the Civil Rights Act of 1964 and the rules laid down by the Department of Labors , Education, and Health and Human Services"	11
18 U.S.C. & 241.	11
Title VII	11

10 U.S.C. & 1034 11
Texas Whistle Blower law, enacted in 1983. 11
The DOD Inspector General report 11
the Deputy Assistant Secretary of the Army for Review Boards and Equal Employment Opportunity Compliance and Complaints. 11
Title 18 U.S.C on racketeering 12
Title 20 U.S.C. section 40.1 on conspiracy. 12
The equal protection clause 12
Title VII and Title IX 12
42 U.S.C. & 13981 (b) 12
42 U.S.C & section 2000e 16 (c) 13
Title IX Education Amendments of 1972. 13
Violence Against Women Act (VAWA), 42 U.S.C. & 2000a (1994) 13
(EEOC Guidance) 13
Title 42 section 1985 14
42 U.S.C. 1983 and 2000e. 14
Feres doctrine. 16
Title 10 1034 17
Texas Whistle Blower Act 17
Title IX of the Education Amendments of 1972 17
20 U.S.C. & 1681 (a) 17
29 U.S.C. S 215(a)(3).14 18
Doctrine of "(s)tare decisis, 20
University 1965 contract. 20
Fed.R. Civ.P.52 (a). 20
The Army Board for Correcting Military Records finding 21
Texas Whistle Blower statute 22
Title 38 U.S.C.A. - 22
Title 42 & 1983 24
Army Regulation 623-105, section IV, paragraph 5-30b. 25
Continuing Claim doctrine applies. 27
29 CFR & 1604.11 (a) (3 27
Public Law 103-337 Oct 5, 1994 108 STAT 2947 & 14502 30
TITLE 38 U.S.C.A. Paragraph 2021 and 4311 (c) 30
38 U.S.C. (Public Law 103-353) Paragraph 4312 31
The doctrine of *Feres* *32*
28 U.S.C. A. 1495, 2513. 32
Statute 42 U.S.C.A. 233 (e) 32
Doctrine of res ipsa loquitur. 33
Texas Law Title 7 32.45 misapplication of fiduciary property state 33
Handbook for Faculty and University Staff's 34
Public Law 103-353 (October 13 1994) paragraph 4301 34
103-353 4303 34
Public Law 100-456 34
18 U.S.C. & 241. 36
29 U.S.C. 440 36
Chapter 4323, Title 38 U.S. C. 37
Doctrine of Laches, 37
28 U.S.C. 2415 38
FRCP 60, 38

EEOC 1614.501 as explained in appendix A of part 1613	39
9 U.S.C. S 215(a)(3).	F-1
32 C.F.R & 562.4 (e)	F-1
Title 5 U.S.C.,	F-2
Title 10 1034	F-3
Title VII and Tile IX	F-4
Title 32 section 709.	F-4
GAO report (GGD-00-70)	F-4
EEOC docket number 05A00652, 2, page 18,	F-5
Feres Doctrine,	F-5
Title 5, Part III, Subpart D, Chapter 55, Pay Administration, Subchapter IX, Back Pay 5596 as	F-7
DoD IG H94L56226017, 10 U.S.C. 1034 military whistle blower	F-10
Title 7 32.45 misapplication of fiduciary property.	F-14
Section 11 Tort of False Imprisonment.	G-1
Section 12 Infliction of Mental Distress and intentional infliction of emotional harm	G-2
Section 36 Violation of Statute.	G-3
Section 1034 of Title 10, United States Code states:	G-3
Title 10 U.S.C. 1034, United States	G-4
Texas Whistle Blower Acts	G-4
Title 38 U.S.C.	G-4
Section 1034 of Title 10 sec 531	G-4
Section 91 Interference With Use and Enjoyment of Private Property	G-5
Section 92 Breech of Contract.	G-5
Promissory estoppel exception to the Statute of Frauds	G-6
Section 102 Contributory Negligence, Misuse , and other Intervening Misconduct	G-6
Section 105 Misrepresentation.	G-6
Section 111 Defamation,	G-6
Section 112 Libel and Slander,	G-6
Section 117 right of privacy	G-6
Section 119 Malicious Prosecution	G-7
Section 121 Abuse of Process	G-7
Section 124 Interference with Family Relations	G-10
Section 125 Injuries to Members of the Family	G-10
Sec 130 Interference with Perspective Advantage	G-11
Undermining Public Policy.	G-13
First Amendment.	H-1
chapter 47 of title 10, United States Code (the Uniform Code of Military Justice),	H-1
section 892 of such title (article 92 of the Uniform Code of Military Justice).	H-1
Fourth and Fifth Amendment rights.	H-2
Fifth Amendment right of life and liberty without due process.	H-2
[illegible]th and Seventh Amendments.	H-2
[illegible]mendment.	H-2
The thirteenth Amendment.	H-2
Gilbert Multistate Exam Workshop 1997,p 647) .	H-3
XIII Amendment	H-3
Gilbert Multistate Exam Workshop 1997,p 232) .	H-3
The Fourteen Amendment.,	H-3
Texas Whistle Blower statute.	H-3
Establishment and Free Exercise clauses	H-3

The Fourteen Amendment.,	H-3
Texas Whistle Blower statute.	H-3
Establishment and Free Exercise clauses	H-3
Gilbert Multistate Exam Workshop 1997, p 237)	H-4
Title IX Claim	H-4
32 C.F.R & 562.4(e) ...	H-5
32 C.F.R. & 562.5.	H-5
First Amendment retaliation	H-5
42 U.S.C. § 1983	H-5
Whistleblower Act	H-5
Handbook for Texas Christian University Faculty and University Staff, pg 47.	H-7
Due Process Clause of the XIV amendment,	H-7
See Tex. Gov't Code Ann. § 554.006(a) (West 1994)	H-8
Fourteenth Amendment violation 5 U.S.C. 1221 and or 1214 and compensatory damages by section 102	H-9
Civil rights Act of 1991 (42 U.S.C. 1981a unlawful intentional discrimination).	H-9
Title 32 CFR 588.26.	H-9
42 US.C. 1983)	H-9
Title VI of the 1964 Civil Rights Act, 42 U.S.C.A. & 2000d,	H-9
Title IX of the Education Amendments of 1972, 20 U.S.C.A. & 1400 & 1681.	H-9
AR 27-40.	H-9
contra proferentum.	H-10
Texas doctrine of *quasi estoppel*	H-10
Claim under 29 U.S.C. 1132 (a) (1) (b)	H-10
29 U.S.C. 1109	H-10
FMLA & 2601 and 2615	H-10
29 U.S.C. & 1132.	H-10
1 Corinthians 13 6-7	H-11
Title IX of the Education amendments of 1972,	H-11
Federal financial assistance, 86 Stat. 373, as amended, 20 U.S.C. & 1681 (a).	H-11
Title VI	H-13
Title VII and Title IX	H-13
Title IX of the Education Amendments of 1972:	H-13
Federal Financial assistance" ... 20 U.S.C. & 1681 (a).	H-13
Department of the Army orders, December 10, 1998	I-1
The Army Discharge Review Board (ADRB) ruling	I-1
Army Board for Correcting Military Records (ABCMR) ruling.	I-1
DOD Inspector General Investigation Report 10 U.S.C. 1034	I-1
Title 10 paragraph 3729, False Claims	I-1
Public Law 103-337 Oct 5 1994 Victim's rights, family advocacy,	I-1
Administrative Procedural Act (APA), 5 U.S.C. 702,	I-2
Title 28 U.S.C. 2401 (b)	I-2
Department of Defense Inspector General Report	I-3
Opinion of the Te..as' Veteran Commission. Veterans Commission interest.	I-3
Dr. Judith Truelson thesis on Blowing the Whistle on Systemic Corruption, May 1986	I-3
FRAP (c) (1)	I-6
FRAP (c) (4)	I-6
FRCP 60 (b)	I-6
FRCP 59 (e)	I-6
Rule 59 (e)	I-7

Rule 60 (b)	I-7
Rule 55 (b) (2)	I-7
55 (b) (2).	I-8
50 U.S.C. app 520 (4) 1988.	I-8
FRCP (60)	I-8
FRCP 54 (b)	I-8
The Soldiers and Sailors Civil Relief Act of 1940	I-8
50 U.S.C. app & 520 (1). (1988).	I-8
O'Conner's rules Chapter 7 A 3.3 (2) Chapter 7 A 3.4	I-8
FRCP 55 (b) (2)	I-8
FRCP Chapter 7, 3.6 (2	I-8
FRCP 55 (a)	I-8
Federal Rules Chapter 7 A. 3.6 2	I-9
FRCP 60 (b)	I-10
42 U.S.C & section 2000e 16 (c)	I-15
Violation of the Texas Whistle Blower Act of 1983.	I-16
Texas law Title 7 & 32.45	I-16
42 U.S.C. cause of action (1381 1383)	I-18

IN THE SUPREME COURT OF THE UNITED STATESPETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

d. Opinions Below.

The opinion of the United States court of appeals appears at **Appendix A** to the petition. The opinion on petition for rehearing en banc was denied. It is published and filed March 17 2000. The opinion of the United States court of appeals appears at **Appendix B** to the petition and is published and filed December 16 1999. The opinion of the United States district court appears at **Appendix C** to the petition and is published and filed January 29 1999. The opinion of the United States district court in a letter is at **Appendix D**, the letter and two selective pages to the court record evinces a timely appeal "appealing final judgment", entry 14 and 42. It is not published. The opinion of the United States district court appears at **Appendix E** to the petition and is published and filed May 12 2000. The court denied motions to reopen the case, for relief from summary and final judgment, to file supplemental pleading for court-appointed attorney and for continuance in forma pauperis.

e. JURISDICTION.

The date on which the United States Court of Appeals decided my case was December 16, 1999. A timely petition for rehearing was denied by the United States Court of Appeals on March 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). Plaintiff identifies the first instances, when the federal questions were raised, the method and manner of raising them and pertinent quotations of specific portions of the record or summary thereof. 1st reprisal resulted in loss of award, and adverse performance rating. The complaint raised was adultery, misconduct, fraud and abuse. A significant factor was the cover up of a fatality. 2nd Reprisal resulted in a wrongful termination, loss of award, and adverse performance rating. The complaint raised was adultery, sexual harassment, fraud and abuse, violation of a DoD agreement between TCU and DoD concerning racial discrimination, and a felony offense, misapplication of fiduciary property, conspiracy and cover up. Authorities of a private university initiated the reprisal causing injury. 3rd reprisal was the result of TCU actions and resulted in a wrongful termination, loss of award, and no performance rating. The complaint raised was pornography in the work place, sexual harassment, fraud and abuse, racial discrimination, and conspiracy of

cover up for political aspirations. Plaintiff has pursued three reprisals before the following forums and agencies:

* Pending appeal	1st Army	2nd TCU	3rd
Commander's Inquiry	x	x	x
UCMJ Article 138 Complaint		x	x
Department of Army IG	x	x	x
DoD IG		x	x
Office of Special Counsel		x	x
Merit Systems Protection Board		x	x
Army Discharge Review Board		x	
Army Board for Corrections	x	x	x*
Defense Office of Hearings and Appeals		x*	x*
Equal Opportunity Commission			x*
University Grievance Procedures		x	
United States Senate Committee on Armed Services		x	x
Congressional Assistance	x	x	x
Texas Veterans Commission	x	x	

From each experience plaintiff tested the authority and methodology for remedy, received referrals and bits and pieces of historic and statutory information to draw a conclusion that retaliators are not held accountable and victims lack remedy. Due to volume, plaintiff supplements the jurisdictional reasons for granting the petition with **appendix F.** The Eleventh Circuit court recently joined the First, the Ninth, and Tenth circuits holding that Title VII's protection against retaliatory discharge extends to adverse actions which fall short of ultimate employment decisions. See Weidman v. Wal-Mart Stores Inc, 141 F.3d 1453 (llth Cir 1998). **Courts prefer to resolve disputes on the merits and disfavor default judgments and produce them sparingly** as indicated by Federal Rules Chapter 7 A 1.3 and court cases cited from the 2nd, 7th and D.C. circuits. In denying to hear plaintiff's appeal, the Fifth Circuit Court of Appeals has departed from the accepted and usual practice of

judicial proceedings and has failed to establish accountability which has persisted in the 6th Circuit Court. Thus, the Northern District Court of Texas decision for Summary-Judgment and Final Judgment was affirmed. The District Court's grant of summary judgment is in conflict with other district courts because there are many disputed issues for trial. The District Court has entered a decision on important federal questions in a manner that conflicts with decisions involving discrimination and whistle blower retaliation in Federal and State Court. The most compelling reason for granting the petition is **Public Interest.** The district court did not aptly characterize this case as one with "widespread implications . . . of interest to the public at large," but concluded, without analysis, that the public interest would be served by granting summary judgment to the University. Fifth Circuit failed to question the obstruction of public scrutiny as one of the important issues in this case. The public also has an interest in seeing this case decided on the merits. It is clear that this case illustrates a miscarriage of justice. It is clear that 5th Circuit Court of Appeals and the District Court rulings are contrary to appellate court rulings. Another important consideration for Supreme Court review is the existence of a conflict of the District Court and 5th Circuit Court of Appeal rulings in comparison with sister District Court and Appellate courts rulings. Employee suits to enforce their statutory rights benefit the general public. Moreover, as the Supreme Court has recognized, fear of employer reprisals will frequently chill employees' willingness to challenge employers' violations of their rights. The danger of witness intimidation is particularly acute with respect to current employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Interpretation of **32 C.F.R & 562.4 (e)** regarding ROTC duty and EEOC regulations are controlling. The head of the institution "The University" exercises control just like any other department. "Protected activity" means opposition to discrimination. "Fraud" is unlawfully depriving something of value. "Abuse" is an intentional wrong. Applicant shows that after he performed the duty of reporting violations of regulation to the Inspector General, TCU respondents committed unlawful harassment and retaliation. These actions were arbitrary and conducted with malice and with reckless indifference to the employee' federally protected rights. **Supreme Court decisions**"[t]angible employment actions fall within the special province of the supervisor. In Ellerth, a tangible employment decision "may be subject to review by higher level supervisors." As long as the

individual's recommendation is **given substantial weight** by the final decision maker(s), that individual meets the definition of supervisor. In Faragher, one of the harassers was authorized to hire, supervise, counsel and discipline lifeguards, while the other harasser was responsible for making the lifeguards' daily work assignments and supervising their work and fitness training. The Court viewed them both as "supervisors," even though one of them lacked authority regarding tangible job decisions. Dean McCracken participated in these employment tasks. Men and women service members, students, citizens, veterans and recruits deserve something different, more decent, and honorable. I personally lost the opportunity to pursue a successful career; however, I also gained humility through this experience - as I continued federal military technician performance in the rank of a non-commission officer instead of as a field grade officer. I have been blessed with an understanding family, a lovely wife and two precious daughters who have stood with me through these many trials. In my military career I served in five Army Divisions. Army Ranger qualification training prepared me to weather tough times so I have not wavered in pressing my cause. In light of the findings below, I pray for your support. General Smith current controversy in Sexual Harassment ; Highly publicized Former Sergeant Major of the Army, Conviction; Adjutant General, General Robert Dezarn vs The State of Kentucky, conviction; Department of the Army, Major General Hale vs The United States, conviction; Major General John Maher III vs The United States, conviction; Command Sergeant Major Riley Miler vs the U.S. conviction; Texas Adjutant General, Major General Dennis liable for $ 50,000 for retaliation, reversed on appeal; General Crampbell cover up at West Point Academy (movie, "The General's Daughter" was inspired on this true account).

f. Constitutional and statutory provisions invoked

Defendants violated (or caused violation) the mandates of **Titles IV, V, VI, VII, IX and X, the Civil Rights Act** of 1964, and regulatory rules laid down by the Department of Labors , Education, and Department of Defense. The law protects against conspiracies and against civil rights under **18 U.S.C. & 241 and 28 U.S.C**. Plaintiff witnessed violations of the **X111 and X1V** amendments, and experienced deprivation without due process. **18 U.S.C. sec 241** sanctions against private actors when "two or more persons conspire to injure, oppress, threaten or intimidate" and **sec 242** punishes anyone who deprives a person of constitutional rights

under the color of law. Defendant intentionally interfered with protected speech. Plaintiff was forced to move to another town 180 miles away, maintain two households and he lost the mortgage on the house. This unlawful move encroached a right provided by the **Fair Housing Act 42 U.S.C. sec 3617. Public Law 100-456** was codified at **Section 1034 of Title 10, United States Code (U.S.C.)** On July 19, 1995 the Department of Defense released a final and complete report and finding of **Public Law 100-456** providing that retaliatory personnel actions are prohibited with respect to any person communicating with Members of Congress or the Inspector General. This report gave reason for cause of action but Plaintiff gave Dean McCracken a second opportunity to make right his mistakes. Having a forgiving spirit, Plaintiff visited with Dean McCracken and suggested a remedy to avoid legal action. A reasonable person would have corrected the misrepresentation of facts and would have expressed remorse. Pursuant to applicable standards of **Public Law 103-353**, Uniformed Services **Employment and Reemployment rights Act of 1994, Chapter 43 of Title 38, United States Code**, the District Courts of the United States shall have jurisdiction to apply damages. Concerning the enforcement of rights with respect to a State or private employer, paragraph (c) (1) (a) states the District Courts of the United States shall have jurisdiction (i) to require the employer to comply with the provisions of this chapter, (ii) to require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions (iii) to require employer to pay person an amount equal to the amount in clause (ii) as liquidated damages if the court finds that the employer's failure to comply with the provisions of this chapter was willful. Plaintiff invokes 102-190 (implemented by Department of Defense 7050.6, September 3, 1992 and Tex. Rev. Civ. Stat. Ann. Art. 6252-16a (herein after referred as the Texas Whistle Blower Act, enacted in 1983), and **Civil rights under 18 U.S.C. & 241 against conspiracies.**

Statutory Tort Provisions Invoked: Appendix G

Plaintiff seeks damages from the following TORT actions and references the appropriate section in accordance with Prosser and Keeton on Tort liability e.g. sections: 11 False Imprisonment. 12 Infliction of Mental stress. 36 Violation of Statute. 91 Interference With Use and Enjoyment of Private Property. 92 Breech of Contract.

102 Contributory Negligence, Misuse , and other Intervening Misconduct. 105 Misrepresentation. 111 Defamation. 112 Libel and Slander. 117 Right of Privacy. 119 Malicious Prosecution. 121 Abuse of Process. 124 Interference with Family Relations. 125 Injuries to Members of the Family. 130 Inference with Perspective Advantage; Undermining Public Policy, common law of expressed individual contracts; unlawful retaliation.

Encroachment of Constitutional provisions Appendix H.

Congress has the authority to regulate the activities that transpired at TCU. Government is obligated to enforce the statutes law and regulation. Plaintiff's actions served a legitimate public interest. TCU allows the use of classrooms for public use. Fundamental rights and civil liberties are at stake. Even though TCU considered all employees as employment at will employees, a government employee may not be fired at will. Plaintiff had a contract and it was for a minimum of three years. There was a deprivation to procedural due process and violation of the First, Sixth, Seventh, Thirteenth, and Fourteenth amendments to the United States Constitution.

g. Statement of the case. Plaintiff received his Regular Army military officer Commission in 1973. In June 1986 Plaintiff served at Texas Christian University as a member of the faculty: His title was Associate Professor of Military Science, Reserve Officer Training Corps, United States Army. Plaintiff was wrongfully discharged from Texas Christian University, was involuntarily separated from the service, reverted to civilian status, then joined the Texas National Guard as a federally employed technician. Appellant reported violation of state and federal statutes to the University and to the Army Inspector General and was wrongfully discharged from TCU as part of a conspiracy, and subsequently from the United States Army and from federal civil service. While Appellant was exhausting administrative remedies through the Army Discharge Review Board (ADRB) and the Army Board for Correcting Military Records (ABCMR), senior leadership of the Army was in dead lock. The Department of Defense Inspector General broke the conspiracy and cover up in July 1995 giving reason and evidence for a cause of action for what occurred at TCU in December of 1986. The DOD investigation was based on the referrals from the Joint Chief of Staff, Federal Bureau of Investigation, the Former Chairman of the Senate Committee on Armed Services, numerous other legislators and an EEOC Chief Administrative Judge. Meanwhile, as the suit was pending, retaliation continued until appellant was terminated

from Federal Civil Service, 5 February 1999. New evidence of conspiracy was forwarded to the Chairman, Senate Committee on Armed Services, March 1999, to the FBI, April 1999, and in a motion to the District Court of Texas, January 2000. Texas and the United States have an interest when students and recruits best interest and safety are in question and when tax dollars are spent protecting systemic **discrimination** and corruption. Plaintiff respectfully shows the court that plaintiff has valid cause and has sustained injury, **injury that can be directly shown as result of the negligence of Texas Christian University.** This petition is about exercising a right, a right which has eroded since the inception of Feres doctrine, in 1950's. It is about duty, leadership, advanced citizenship, and character. Our youth, females, and the disadvantaged are victims. It highlights the need for DoD enforcement of agreements between the department of the Army and a DoD affiliate University charged with administering a ROTC program. The lack of enforcement of standards resulting in discrimination violations impacts on **all** Americans, especially the service connected. Service members, like any other government employee, have inalienable rights, rights to due process and rights of remedy when they are victim of retaliation. This writ will show the specific injury, the erosion of rights, the impact to our country, and class action implications for those who have reported racial discrimination, fraud, corruption and retaliation. This case is prejudiced by the Texas record on education and ineffective management of Texas State Agencies. Modeled from federal statutes, **Texas Education Code, Sec 61.001,** purpose is: (a) to provide leadership and coordination ... for institutions and governing boards to the end that Texas may achieve excellence for college education of its youth and (b) in the exercise of its leadership role, the Texas Higher Education Coordinating Board ... shall be an advocate ... of sufficient authority ... to the benefit of the students ... and ... to citizens ... The code addresses compliance with state and federal guidelines and **undertakings with Private Universities.** Arguably, the Board has discipline, investigative and accreditation authority. Similarly, the Governor has authority, the same authority as he has over the Texas National Guard. The existence of a weak Texas Constitutional Government does not justify corruption. The University and Governing Boards violate their own charters. It is misrepresentation when the Texas Guard and Texas Education program of higher education learning are projected as role models. The public deserves better monitoring and control of the programs.

Plaintiff served as a graduate student and University Assistant Professor. Texas Christian University (TCU) receives about $ 6,000,000, annually. Title 10 1034 U.S.C. Investigation reveals that plaintiff reported sexual assault, misapplication of fiduciary property, and other impropriety. What happened after each of the reprisal actions was intolerable - cover up, misconduct, humiliation, betrayal, the opposite of honesty and equity. Texas Christian University in corroboration and conspiracy with members of the Department of the Army violated the law. In the military, service members and particularly officers, are principled people who live by rules and a set of high standards. This becomes a way of life at the inception of our careers. We depend on each other to be honest and trustworthy. After disclosure of the scandal at TCU, plaintiff lost an active duty career and his commission as a United States Army Officer. The fact that plaintiff performed in the Texas National Guard for seven consecutive years as a Sergeant, without promotion is germane to this case. Under the provisions of the continued claim doctrine, retaliation never ceased. For reporting the corruption at TCU, the injured party was partially exonerated by the actions of United States Senator Sam Nunn in 1996. "Mr. Boswell's case merits careful review and careful consideration in light of the strong public policy against whistle blower retaliation". Plaintiff was in the National Guard at the time the honorable Senator came to the realization that plaintiff was harmed. The Secretary of the Army through the Board for Correcting Military Records (ABCMR) absorbed some responsibility, restored the plaintiff's rank to Major and instated retirement, retroactively with back pay. Due to mistakes and differences with the settlement, the settlement was returned and is currently in the process of adjudication by Department of Defense Office of Hearings and Appeals. At the time of the ruling of the District Court and of the ABCMR there was no evidence of conspiracy, but a weight of evidence exists showing an indifference to service member's interest. The interests of agency heads, federal and state, were accorded excessive weight contrary to principles of equity. Moral inequity is issue. There exists an imbalance. What the public may have expected to be accorded to be remedy for "an educator" or "a citizen soldier" or "student" was not meted out on this occasion. As the ABCMR adjudicated government error, plaintiff was experiencing retaliation in the Texas National Guard. It was a replica of the reprisal found by the DoD Inspector General. Plaintiff witnessed violation of policy and misconduct in a Texas National Guard Armory. The Adjutant General

directed investigation. A Navy Captain (investigator) found reprisal 9/27/97 but the finding was withheld until 04/15/99, three months **after involuntary termination** on 5 February 1999. Previously, plaintiff submitted a FOIA request 01/08/98 and on 04/08/98. Complainant respectfully requested the Governor's intervention: "If public scrutiny were involved, it may spark criticism of the Texas National Guard. As our Governor-in-Chief, you have a significant interest in the uniformed serviceman, about education, the work ethic, the leadership, and about honesty". Had the injured party been armed with the reprisal and recommendation that the Army National Guard Colonel be disciplined, this would have benefited the petition to the Army Board and to two special promotion selection boards to Lieutenant Colonel. Dual hatted in the Guard, as a sergeant and civil service technician education school manager, plaintiff filed evidence of misrepresentation and fraud for an unsatisfactory showing - an agency finding that Texas Army National Guard soldiers, enrolled for military education, achieved only 50 % success rate. Comparably to the 52 states, Texas military education rating was last. Concerning reprisal, the catch 22 is that protection under 5 U.S.C. 2302(b)(8) or military law is not enforced. The Office of Special Counsel on 10 September 1999 stated OSC and MSPB do not have authority to enforce 5 U.S.C. because the National Guard is not a federal entity and the Adjutant General is not a federal employee. Yet, the Guard receives tax payer funds. For the third reprisal, plaintiff's Guard career ended under the Governor's leadership as Commander in Chief. Cumulatively, the events have the markings of a survival story. On 8 March: **"I regret, even though I was under orders, that I was a participant in the University's and Army Conspiracy ... I am committed to just and positive action".** Due to plaintiff's loss of social and economic status, deprivation of liberty to my family, I have the utmost respect for POW Rancher Tom Lancaster. I am humbled by Mr. Lancaster's acclaim: "I appreciate Mr. Boswell's courage and ability to help us survive, under perilous conditions (lost, high mountains, rugged cannon, inclement weather, miserable circumstances). I give credit to the Army survival training program. Now Jim needs help. He has a Masters in Public Administration". Self reliance was my mistake. My inspiration is for trust and justice. I lost to power, to special interest, but my sense of honor and self respect has matured. I reported to the University authorities and to the Department of Army Inspector General that an Army ROTC Sergeant Major assigned at TCU had sexual intercourse with my

student, according to her, without her consent. I provided an audit which showed the misapplication of over $ 14,000 of the **youth's funds** to the University Dean. I objected to **minority discrimination** as the record shows in five separate accounts. The damage to me is insignificant compared to that of the students' and to one brave black employee who tried to help me. He disappeared, vanished, -- a situation the University failed to disclose during discovery. This black employee victim was two years short of a federal retirement. He was unfairly intimidated. One officer prophesied he is at the bottom of Ben Brook lake. Ten students' grades were changed. Students were briefed on the University's version of activities. Military officers escorted my daughter and I to the local hospital. I reported for psychiatric evaluation. Media was not involved: The truth of these matters has never been heard. It is time for the truth to be heard, and for justice to be affirmed. I have been largely unsuccessful in redress for remedy and "reform" through State and federal legislative and executive channels. My experience is that the Board of Trustees for the University, the Secretary of the Army and Governor Bush had opportunity but failed to take a stand for service members. Yet, several senior officials have questioned the DoD affiliates actions. Complainant relies on the continuing claim doctrine and provides evidence to the EEOC of discrimination based on retaliation and religion. Over the years the case has managed to surge forward, one step at a time perhaps because of the honorary people who deep down looked at the black cadet and female student victim and saw their son or their own daughter.

h. Argument.

Veterans Commission interest. The Texas Veterans Commission states: "From an institutional memory standpoint we have represented 250 cases. Army and Texas Christian University authorities have substantially denied our client due process. Recommend full relief." There is a **pattern of racial discrimination**. The pattern of racial discrimination, corruption and retaliation was first demonstrated by black Sergeant Major Fant, retired (initial filing exhibit 14). Sergeant Major Fant's removal from the University, a year earlier before my unlawful discharge was also unjustified. Fant's constitutional rights were violated. The two incidents with two black Sergeants, Sergeant Major Fant and Sergeant Dunlap casts doubt on whether TCU is being truthful during discovery. TCU denies that plaintiff reported racial discrimination. In Freedom And the Court: Civil Rights

and Liberties in the United States by Henry Abraham and Barbera Perry page 399, the author states "Perhaps the most significant and emotion - charged area of the "private" - "public" dichotomy is that of the fourteenth amendment "state actions", if any, of genuine private schools. We know, of course, that those otherwise private institutions of higher and lower learning that receive funds from the federal government have had to toe the proverbial "no discrimination" line in accordance with the mandates of **Titles IV, VI, and VII and IX of the Civil Rights Act of 1964 and the rules laid down by the Department of Labors , Education, and Health and Human Services"** etc. The civil rights protects blacks from enjoying the same right to make and enforce contracts as enjoyed by white citizens. In supreme court decision of 8;1 authored by Chief Justice Burger, it states: "Government interest in eradicating racial discrimination substantially outweighs whatever burden denial" etc. Bob Jones University v United States, 461 U.S. 574. Plaintiff, regardless of color of race as white, is afforded protection and compensation against conspiracies under civil rights statute, **18 U.S.C. & 241. Defendants claim** that title VII does not apply to TCU is incorrect. Plaintiff had knowledge that Dean McCracken investigated previous sexual harassment complaints. Plaintiff reported sexual harassment misconduct, a hostile environment, and possibility of sexual assault timely, one day after the offenses were reported to plaintiff. TCU reveals that **10 U.S.C. & 1034** applies to the Armed Forces and not TCU. If the statute is rationally related to a legitimate state interest, it is valid. State and local government activities may be regulated by general laws that apply to both the public and private sector, even if the regulation affects integral government functions. Since the state is free to provide its citizens more civil protection than it is required by the federal constitution, the court is requested to apply the state counterpart, **the Texas Whistle Blower law, enacted in 1983**. Concerning the prohibition of retaliatory personnel actions the law states "no person". . **The DOD Inspector General report in exhibit 1 on page 6, last line,** *In Mr. Boswell's case, the fact he engaged in whistle blower activity is not in dispute.* On page 1, second paragraph the DOD investigator quotes the Acting Assistant Secretary of the Army for Manpower and Reserve Affairs and the Secretary Review authority concerning the decision by **the Deputy Assistant Secretary of the Army for Review Boards and Equal Employment Opportunity Compliance and Complaints.** The report states that he now believes he made the

wrong decision and characterized it as *arbitrary* and contrary to the principles of equity he generally employed in similar circumstances. Plaintiff was prohibited from filing suit until his case was heard by the **Army Board for Correcting Military Records**. Senator Sam Nunn quoted in his letter of support (September 16, 1996) to the Army Board for Correcting Military Records that *the Assistant Secretary of the Army and the DOD Inspector General concluded that Mr. Boswell was subject to retaliation for whistle blowing in 1986 and 1987.* Plaintiff also notes defendant's violation of other statutes **Title 18 U.S.C on racketeering** and concerning **Title 20 U.S.C. section 40.1 on conspiracy**. Coconspirators need not know the details or every objective to be convicted. **The equal protection clause** does not preclude state enforcement of private discrimination. The court may reverse the district court's decision if the district court relied on an erroneous interpretation of the law, made a clearly erroneous assessment of the evidence, or struck an unreasonable balance of the relevant factors. See K. V. MartCo., 173 F.3d at 1223; Creative Tech., Ltd. v. Aztech Sys.PTE, Ltd., 61 F.3d 696, 699 (9th Cir. 1995). The district court's final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). The movant shows that: **judgment was entered which ought not, in equity and good conscience, be enforced.** The District Court cites three reasons for ruling for defendants because **(1) Texas Christian University is not a state or local government body**. Now Plaintiff shows why TCU under discrimination laws is a state actor, **joint conspirator**, and employer; **(2) Plaintiff was not an employee of Texas Christian University (TCU).** TCU officials meet the Supreme Court's definition for being a supervisor; **(3) Plaintiff cannot otherwise establish a cause of action against the moving defendant's under any theory alleged by plaintiff.** Recent Supreme Court decisions, new events and new evidence of additional tangible employment actions reveal manifest error of law and facts. **Title VII and Title IX** statutes make employers liable for discriminatory acts of their "agents,": Supervisors are agents of their employers. Movant has a **good cause** and **meritorious defense**. In Boswell, the District Court granted final judgment, without hearing, "Dismissed with prejudice all cost of court borne by the plaintiff". However, **42 U.S.C. & 13981 (b)** authorizes a cause of action "shall be liable to the party injured, in action for the recovery

compensatory and punitive damages, injunctive and declaratory relief, and relief as the court may deem appropriate". **42 U.S.C & section 2000e 16 (c)** empowers courts to entertain an action by a complainant still aggrieved after final action. **The U.S. Government's final action was May 25 1999, granting plaintiff compensatory relief, after the court's ruling. Movant is victim of mistake.** 4th Circuit Court **reversed and remanded** a similar District Court order. The order dismissed the complaint and held that the complaint failed to state a claim under **Title IX Education Amendments of 1972**. (Writ Of Certiorari To the 4th Circuit United States Court of Appeals No 99-5, In the Supreme Court of America: Brzonkala v. Virginia Polytechnic and Antonio Morrison). There exists **prejudice to Plaintiff and two daughters.** Newly discover evidence clearly shows that TCU and the agency **has demonstrated that it will tolerate harassment based on sex (with or without sexual conduct), race, religion, and protected activity (i.e., opposition to prohibited discrimination or participation in the statutory complaint process). Violence Against Women Act (VAWA), 42 U.S.C. & 2000a (1994)** civil rights statute prohibit acts motivated by bias. Plaintiff reported "sexual assault". An anti-harassment policy and complaint procedure should contain, at a minimum, a clear explanation of prohibited conduct; assurance that employees who make complaints of harassment **or provide information related to such complaints will be protected against retaliation. (EEOC Guidance)** "Our experience as attorney generals strengthens belief that the problem of violence against women is a national one, requiring attention, federal leadership, and federal funds." **Injured party was prevented from fully and fairly presenting its case at trial**. Opposing Attorney (Mr. Ginsberg) resigned on **August 12 1999** from the case after the District Court ruling. Plaintiff's case was damaged due to unbecoming conduct and misrepresentation of facts. TCU causal connection to injury and TCU culpability is shown. **"We are General Counsel to Texas Christian University", signed Mr. Ginsburg (Defendant's attorney) notification to plaintiff "to immediately cease and desist all communications with TCU, its faculty, administration, students and board of trustees regarding former assignment to the TCU ROTC unit**. The enforcement clause in the fourteenth amendment states in part, " no state (or of one acting under the color of authority) shall ... deny any person within its jurisdiction the equal protection of the law." **New evidence concerning civil conspiracy** is

revealed. "Every conspirator is jointly and severally liable for all acts of conspirators taken in furtherance of the conspiracy" United States v. Carpen F.2d 824, 828 n. 3 (9th circuit 1992). Key witness testimony to the conspiracy link TCU actions to TORT liability. Plaintiff clearly shows the causal effect. In violation of **Title 42 section 1985**, conspiracy to interfere with civil rights, TCU conspired and interrupted, impeded, and intimidated plaintiff from discharging lawful duties, obstructed and defeated plaintiff from the equal protection of the law, and deprived plaintiff of rights and privileges. There is no statute of limitations on conspiracy. Plaintiff can prove the elements. The Supreme Court ruling, concerning the injured at will employee in Haddle v. Garrison, noted the eleventh circuit error in No 97-1472 decided December 14 1998. "the party so injured ...may "recover damages" 1985 (3)". Defendant violates **42 U.S.C. 1983 and 2000e**. Plaintiff has a prima Facie Whistle Blower case, has met all elements, and has proof to establish inference of discriminatory motive. Plaintiff shows ripeness for a new suit based on ten additional affidavits of compelling evidence. "Defendants admit it appears that Plaintiff's discharge from the United States Army was in error and that the United States Army has recognized such error." Darnell's affidavit states: **"All I can say is that TCU also had a vendetta for Jim and was involved in a conspiracy to ruin his career".** Vanessa Boswell's affidavit alleges: **"Texas Christian University and the Army damaged my life".** The affidavit explains in detail the damage. Does the District Court order conclusively determine the disputed question and resolve an important issue on the merits of the action? Did the court **ignore the fax letter justification for requesting an extension due to no fault of filing the summary judgment response on the following day. Did the district court abuse it's case management discretion by declaring final** judgment on the same day that plaintiff's response for summary judgment was due? Although the **economic harm** was corrected under provisions of federal back pay act, it has not yet been executed due to error. Did this situation prejudice plaintiff's ability to litigate the case? Obviously, there was a violation of a statute for the ABCMR to warrant such corrective action. Was it an abuse of 5th Circuit court discretion to not review these issues (deny review) on appeal? Did the District Court dismissal of all United States defendants place the plaintiff in a catch 22 situation? The quandary was that plaintiff had to separate the actions of the conspirators which allowed for shift of blame and anonymity. Clearly the evidence reveals

corroboration, joint motive and execution of the wrongful termination action. Fortunately, the ABCMR declared the loss of career void. Failure to hear the case on the merits and to resolve the disputed issues runs afoul of the public's common law right of access to judicial proceedings, see Nixon v. Warner Communications, Inc, 598-99 (1978); EEOC v. Erection Co., Inc., 900 F.2d 168, 169 (9th Cir. 1990). No special circumstances justify secrecy and failure to go to trial. Trial is the only remedy to reestablish plaintiff's credibility, reputation, honor and to compensate for the personal embarrassment, harassment, injury, ridicule and loss of education privilege and future earnings. Publication of an opinion adjudicated objectively serve multiple purposes. It show government willingness to address alleged cover up of a federal crime. It addresses the conspirator actions and feared retaliation. Deterrence of misconduct benefits our society. A message is required that prevents future retaliation. Failure to go to trial sends the wrong message. **An improper balance exist.** A district court must balance the motion for summary judgment against the general presumption that systemic problems and the lack of public information and support caused the risk of unfairness to the plaintiff. Applying this balancing test, courts have permitted detailed the analysis in published opinions. What remedy is there to compensate for the public humiliation resulting from TCU **employer's request for** removal from University premises? Damage to plaintiff is done. Nothing was accomplished "to preserve privacy in a matter of sensitive and highly personal nature," James, 6 F.3d at 238; see also Doe v. United Services Life Ins. Co., 123 F.R.D. 437 (S.D.N.Y.1988). Public accountability and acknowledgment that plaintiff was wronged is justifiable to clear plaintiffs reputation. Making plaintiff whole again is the nature of Supreme Court business and is justifiable. TCU admissions are compelling. The grant of **certiorari** as a matter in equity will allow the next person assigned to ROTC duty at TCU to be apprised and cautioned of the ramifications for reporting an incident. The risks for recommending the criminal prosecution and public disclosure of a University official should be a matter of public concern. A new employee has a right to know the institution's history and intention to engage in illegal conduct, the probable retaliation action, and legal protection just the same as knowing a history of a car or home. **Grievance Procedures were denied.** Plaintiff had standing in the capacity as an employee, **a student** and Vietnam Era Veteran. The University violated law and due process when it denied plaintiff use of the University's grievance

policy. Anonymity, silence, quick deportation, involuntary discharge served to prejudice the whistle blower and the public's interest in knowing the protagonist's identity and actions. Conspiratorial actions were employed to shield TCU from accountability for retaliation. TCU's attorney's letter, having the affect of an order to silence, escalated the severity of the threatened harm, heightened the reasonableness of plaintiff's fears, and increased the vulnerability to such retaliation. The court abused its discretion by ignoring the precise prejudice at each stage of the proceedings and by failing to consider how the proceedings may be structured so as to mitigate that prejudice. The court obstructed the public's view of the issues and the court's performance in resolving them. The court and defendant prejudiced the plaintiff's ability to litigate the case. There are **erroneous interpretation of matters of law**. The district court erred by failing to consider evidence of threatened retaliation by parties not before the court; concluding that risks of extraordinary economic injury are insufficient as a matter of law to satisfy plaintiffs' burden; failing to consider as a factor plaintiffs' vulnerability to retaliation; failing to identify specific prejudice to plaintiff; and failing to decide whether the public's interest was best served by dismissing the joint conspirators from the suit. The extreme nature of the retaliation threatened against plaintiff coupled with plaintiff's highly vulnerable status was cause for plaintiff to reasonably fear severe retaliation. This factor of fear I considered. It outweighs the interests of the defendants and is justification in favor of open judicial proceedings. No factors weigh for concealing the evidence, evidence which was in the defendant's possession. At present, plaintiff suffered prejudice. Defendants have not. The **threatened injury was severe.** The district court improperly discounted much of plaintiffs' evidence. By dismissing the DoD defendants, first, the court bars plaintiff from redressing injuries inflicted by third parties, such as an additional finding of reprisal, the death threat, and defendant concealment of the disappearance of a key witness and victim of racial discrimination, and investigation concerning stolen military munitions. Second, plaintiff draws inference that the court concluded that plaintiff did not need protection from the deprivation of an entitlement, e.g. against economic harm. Each of these conclusions is incorrect as a matter of law. A district court with subject-matter jurisdiction over a case has the power to issue orders relating to third parties. See, e.g., Seattle Times v. Rhinehart. In this case DoD defendants were inappropriately dismissed citing the **Feres** doctrine. **Discovery is another issue**. The district

court erred as a matter of law by refusing to take into account evidence of threatened retaliation, fear of retaliation, equal protection within the law, and by not recognizing a federal protected statute **Title 10 1034** and its predecessors. Plaintiff as a citizen of Texas is afforded state right by the **Texas Whistle Blower Act** to report disclosures applicable to State violations "sexual misconduct" and "misapplication of fiduciary property". The occurrences were on private property not federal property. The events involved an institution governed by the Texas' constitution. Complainant, largely on the behalf of students, reported the violations of published University policy concerning sexual harassment, harassment, retaliation and grievance procedures. The district court also erred in concluding that military service members and ROTC affiliated cadets are not subject to retaliation, **Title VII and Title IX claims**. The court ignored these complaints and shielded defendants from judicial proceedings. Here, plaintiff faced "greater threat[s] of retaliation (death threat) than the typical [FLSA] plaintiff. While threats of termination and blacklisting are perhaps typical methods by which employers retaliate against employees who assert their legal rights, the consequences of this ordinary retaliation to plaintiff was extraordinary. A military officer's career and two black sergeants careers were terminated. The black sergeants witnessed the misconduct and were subject to an Army Inspector General Report finding. I witnessed discharge of cadets who were victim to the abuse. I considered the action as arbitrary and capricious. Defendant's denies any report of discrimination. It is a disputed issue. **Manifest error** is shown in **Title IX of the Education Amendments of 1972**: **"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal Financial assistance" ... 20 U.S.C. & 1681 (a)** Principles of the continuing claim doctrine and causation are applicable. Newly discovered evidence of conspiracy, **and additional finding of reprisal** against the joint conspirator was withheld from plaintiff until after the District Court ruling. These are reasons to substantiate "manifest error" and justification for a hearing to contested fact issues. Concerning **Burden of Proof,** A Department of Army Inspector General command and information bulletin states the burden of proof rest with the employer in whistle blower cases to prove their innocence. Plaintiff was burdened with debts arising from defendant's inexcusable actions and the burden to produce the

preponderance of evidence. The district court makes an inference that plaintiffs' evidence of a threat of physical injury as "based on speculation, hearsay and innuendo." The U.S. 9th Circuit Court of Appeals in Does made clear that where plaintiffs fear extraordinary retaliation, such as deportation, arrest, and imprisonment, plaintiffs do not need to prove that they face a danger of physical injury. Boswell feared deportation and was deported to another military installation away from his family. Boswell was incarcerated, restricted, and ordered to silence twice. A government attorney's witness affidavit of the Army Colonel's death threat is in the record. There was **Reasonableness of Plaintiffs' Fears.** The district court's inference that plaintiffs' evidence of threatened retaliation is prospective and conjectural [and] based in large part on hearsay and innuendo, suggests that plaintiff failed to prove that his and witness fears were reasonable. This ruling is in error because plaintiff was not required to prove that the defendants intend to carry out the threatened retaliation. What is relevant is that plaintiff was threatened, and that a reasonable person would believe that the threat might actually be carried out. Comparatively, the 9th circuit believed in Does, that plaintiffs satisfied this burden. On numerous occasions, plaintiffs were interrogated about, warned against, and threatened for making complaints about their working conditions by defendants and recruiting agents. Threats ran the gamut from termination and blacklisting, to deportation, arrest, and imprisonment. Plaintiffs' employers, as the employers in Does, had the power to terminate workers, and cause them to be deported. In Does the government of China has the ability to arrest and imprison its citizens. Evidence of collaboration between defendants, the recruiting agencies, and China's government suggests that threats made by defendants and the recruiting agents may be carried out by China's government. The fact that the Chinese government has punished workers for complaining about their working conditions abroad also bolsters the reasonableness of plaintiffs' fears. ("The statutory prohibition against retaliation provides little comfort to an employee faced with the possibility of subtle pressures by an employer, which pressures maybe so difficult to prove when seeking to enforce the prohibition."); Gomez, 60 F.R.D. at 107. In Boswell, the district court clearly erred in deciding that it had no jurisdiction to remedy any harm to plaintiff from DoD defendants. Second, reliance on the deterrent effect of post hoc remedies under the DoD equivalent to the FLSA's anti-retaliation provision, **29 U.S.C. S 215(a)(3).14** subjected plaintiff to the vagaries

of promises and controversy of effective enforcement mechanisms. **Plaintiff Vulnerability to Retaliation is apparent.** The district court failed to consider vulnerability. Plaintiff was in the military where civil rights are deprived. Military supervisors who violate regulations are shielded by the chain of command by military controlled investigations, release of evidence, influence and pressure to find in favor of the administrator or the commander, by sovereign immunity and the *Feres* doctrine. Under the terms of the recruitment contract, plaintiff does not have the freedom to quit working for one employer and seek employment at another location. Defendants terminated victims at will. Defendants had the power to have witnesses deported almost instantly, despite university policy and constitutional law prohibiting adverse personnel actions without due process. Military authorities were arguably under the university control, retained the legitimate authority, within reason, to restrict, confine, and isolate a cadet or service member and to deprive the cadet or service member from pay entitlements, privilege, or access to legal assistance. Illustrations of restriction, confinement, bar from university premises and speaking with cadets and faculty are the subjects of letters to plaintiff which was offered as evidence. Plaintiffs' vulnerability to retaliation is enhanced at this stage of the litigation because he is one service member among an estimated workforce of the number of DoD employees over 1,000,000. The liklihood of others joining the suit providing safety in numbers is minimal because employees realize their chances of career termination is greatly increased, by complaining. There is **Prejudice to Plaintiff.** Can it be discerned that the District Court correctly considered prejudice to plaintiff? The court refutes plaintiffs' evidence that he held a reasonable fear of retaliation. At oral argument, in Does, the Secretary of Labor, participating as amicus, stated that the Secretary's position is that **S 215(a)(3)** is not effective in protecting employees from retaliation. TCU was hostile toward plaintiff based on plaintiff reporting discrimination based on race, sex, and regard for religious principles against fraud, dishonesty and adultery. He invokes the equal protection clause. Concerning **Standard for Review,** Appellant request the United States Supreme Court examine this miscarriage of justice and the court's discretion and whether the district court abused its discretion. The District Court's Decision is arbitrary and unreasonable unlike the finding reported by **Department of Defense Inspector General.** This report quotes the Assistant Secretary of the Army: "Because he was unaware of the finding of reprisal, he now

believes he made the wrong decision and characterized it as ***arbitrary*** **and contrary to the principles of equity he generally employed in similar circumstances**", page 43 of the court record. Under the **doctrine of "(s)tare decisis**, like facts will receive like treatment in a court of law". Although the Army Board for Correcting Military Records is not a court, it is an adjudicator with similar interest - justice. The district court erred in applying the law, weighing the evidence, and deciding whether a fact issue exists. In the appeal to the 5th circuit, makes references to the specific pages to illustrate points. There was sufficient evidence to support a jury verdict. One of the contested issues concerns the **University contract,** (plaintiff exhibit UU) to 5th Circuit. Plaintiff was required to enforce this **1965 contract. It was between the University and the Army.** Then there was a verbal contract between the University and the injured party. At Exhibit UU, Dean McCracken is in denial that discrimination was reported all though he makes reference to "other allegations of improper actions". The Dean was advised "cover-up was underway" but as the Dean states: "conversation became circular". The fact finding of the trial judge is clearly erroneous under **Fed.R. Civ.P.52 (a).** It appears the trial judge ignored Plaintiff's assertion of conspiracy (page 10 CR). Before the court, and forwarded to the Secretary of the Army and Federal Bureau of Investigations, is exhibit XX . The admission states:

> **"I hope this letter will correct an injustice. It is my testimony that Major Boswell's due process was violated and Army and Texas Christian University officials proceeded to hastily cover-up the situation. When the chips were down, the University and Army Chain of Command appeared to ignore compliance with law. Now I firmly believe their is a criminal connection (1) Reprisal - a black Sergeant major's removal from TCU, (2) Major Boswell's tragedy and (3) the sudden and unexpected disappearance from TCU of a black supply Sergeant. He had completed eighteen years of military service".**

Senator Gramm forwarded this letter and plaintiff's desire to appear before the Senate Armed Services Committee to the Chairman, Senator John Warner. The District Court was aware of harassment causing **fright to daughters**, (CR page 12), and constitutional violations (CR 16-18). **DoD Inspector General finding is compelling and controlling.** DOD Inspector General conclusion is **"due process was violated"** CR 39. **The Army Discharge Review Board finding** states:

"The applicant after making allegations of several immoral and procedural improprieties was the victim of unfavorable actions" "reasonable to assume that the applicant was at risk concerning his future in the ROTC" "FORSCOM Board of Inquiry and the Inspector General of Investigations left a high degree of doubt concerning there actions of the applicant's chain of command. Record clearly does not support the reason for discharge." (CR 44)

The Army Board for Correcting Military Records finding was reprisal. The evaluation report was removed from the record and **"that the action discharging him from the Army on 12 April 1989 is void and of no force or effect"** (CR 79). Over all and in reality, the Army Board for Correcting Military Records did not make plaintiff whole again e.g. reinstatement with seniority, interest on the lost wages for ten years, compensation for lost schooling, lack of awards, damages to plaintiff and family, and for a lost TCU degree, and loss of career and future employment. A **3rd investigator "finding" of reprisal was that** Plaintiff was denied legal assistance to assist in litigation in multiple forums. The finding was from an investigation that was conducted in 1997. It may have been controlling yet it was concealed from court and ABCMR. This omission helps to support plaintiff's theory of conspiracy and cover-up. This retaliation was an effective way to disadvantage plaintiff, to continue the conspiracy. This event prejudiced the plaintiff's court performance. On two previously occasions, appellant had to be medically treated for anxiety and depression. On the day the plaintiff's response to the court was due, plaintiff was ill. Military sick leave was approved. Appellant was too sick to file yet had spouse fax an explanation and motion to the court. Still sick but able, appellant filed response to the defendant's motion at 11:44 on the next day 1 February 1999. The motion was denied. **Anxiety and depression increased.**

The contested portion of the Army Agency's final decision, United States defendants dismissal, and the granting of summary judgment should be reviewed in accordance with standards of review set forth by the Ellison vs Conner and Department of the Army Corps of Engin. (5cir No.97-30359, NO 98-30203, Sep11,1998) One disputed material was that there was no report to a law enforcement agency and over the meaning of employer. When Federal law is lacking, courts incorporate state law. In the absence of Federal Whistle Blower law, plaintiff applied state law and it required exhausting administrative remedies. The court may be overwhelmed and confused as to an applicable standard for care. But consideration should be given on the merits. Plaintiff

reports that an audit was given to Dean McCracken and this is not in dispute (exhibit UU 000007). The audit reveals that the conspirators operated the fund inappropriately and in an unlawful manner for at least three years. Plaintiff requests that the fairest of standards is the **Texas Whistle Blower statute**. Plaintiff Green's case is a victory for those dedicated to preserving constitutional and traditional values, good character, moral courage, and public scrutiny of government system. A second standard of care is **Title 38 U.S.C.A**. Specifically, considering the statutory bias against federal whistle blowers, the District Court and the United States government, in fairness, could have appointed an attorney and granted a speedy hearing that was requested for preliminary and declarative relief pages (24) (32), for dismissing the United States defendants (241) on claims of reasonable dispute, accepting the U.S. arguments that plaintiff failed to plead and prove jurisdiction (148) and not wavering Sovereign Immunity (149) for failure to apply the applicability to Whistle Blower statutes (150), or Sexual Harassment Law (152), failure to consider tolling for exhausting administrative remedies (153), accepting defendant's argument on jurisdiction (159) and not questioning the fairness that promotion is non justifiable (160), not questioning the government's failure to respond to freedom of information requests referenced in the original petition (page 26) and supporting the government in refusing to answer 24 questions of discovery page (501-507), failing to consider plaintiffs response to defendant's motion for summary judgment, determining no issues of material fact concerning circumstances regarding the retaliation action of requesting removal and dismissal. The District Court should have recognized the private sector's competing interest especially with regard to potential media coverage affecting TCU donors. It may have been in the best interest from the University's perspective to remove plaintiff from the picture. Consider the scandal of the Sergeant Major of the Army and applicable media coverage. The district judge should recognize that plaintiff reported violation of federal and state statutes and violations of military law, misconduct and inconsistency regarding university and military regulation, that defendant's actions toward plaintiff were unreasonable, that plaintiff should have been afforded grievance procedures like other members of the university staff, that there was a pattern of retaliation, that evidence supports the liklihood that Defendants did violate the statutes, military adultery law, that Texas Christian University and military officials had a conspirator role, in retaliation against plaintiff, a matter in

dispute, that government immunity should be excluded as was recited in the original petition page 30 in Plaintiff's original petition Texas Dept. Human Resources v Green No. 3-92-059-CVTex.App.Austin,1993,nw.h at pg 8. The District Court should have recognized, based on circumstances, plaintiff's plea that constitutional rights and liberties were deprived and unequal compared to others, that if the Defendant Brief for dismissal arguments are acceptable, then there are issues of contract misrepresentation on the part of Texas Christian University which sends repercussion to every initial recruitment of every soldier of the army during commissioning or recruitment, a matter of concern amongst our current legislature and a matter of public interest. The district court erred by not recognizing the United State's Senate Committee on Armed Services Staff Director's inquiry concerning unlawful whistle blowing reprisal within the Texas National Guard (page 58), General Shalikashvili letter on page 60, the FBI letter on (page 62), harassment and reprisal actions e.g. false imprisonment (85) the death threat at (87), verbal admonishment for interviewing on national television (a constitutional violation in dispute) (89), the incident concerning the officer caught with the pornography (91) who wrote the admonishment, a potential violation of federal statute e.g. groundless removal of a black cadre member which is a clear compelling violation of racial discrimination and violations of civil rights (103), the Inspector General conclusion that ten grades were changed and to question why (106), a discrimination violation in dispute, the substantiation of a privacy violation (107), the potential that a felony offense 32.45 misapplication of property occurred (108), potential violation of a federal statute e.g. evidence of the hostile environment from sexual harassment concerning intercourse without her consent (110), and the six authorities on page (253) willing to testify. The district court showed exception to Senator Nunn's plea for fairness "in light of the strong public policy against whistle blower retaliation" on page 1347, the TCU show girl's termination of contract (358) in disgust who dropped out of the ROTC program also sent to her Congressman. And we ask what is wrong with our Armed Services that we can not attract good people? A senior officer from **the Office of the Chief of Staff of the Army described the cover up investigation.** The district court erred in ignoring the Colonel's finding that the investigations were "incomplete and protective" and "maintain the lily white atmosphere" (468) "so when I read that, that caused me to read a lot deeper into this stuff and I think it is a bunch

of crap" "put together" with absolute 100 % simon-pure propriety" "just ludicrous" "system up there is a worm-eaten piece of wood" "surprised General Williamson let it happen" (469). The record had numerous recommendations and commendations, seventy-two in all. **Plaintiff's credibility is enhanced by the statement from a WW II POW**. (At page 481 CR) , he describes an incident "lost, hunting, Colorado, high mountains, rugged canyon, inclement whether conditions, according to the Sheriff, helicopter evacuation not possible". "In Mr. Boswell's case, the fact that he engaged in whistle blowing activity is not in dispute" Inspector General Report, CR 43. Why has the court denied Plaintiff's motions? **TCU is a state actor for purposes of Title 42 & 1983**. In Taylor v Charter Medical 97-10084 (5th cir 1997), Taylor alleged various state law claims - fraud, medical negligence, false imprisonment, breach of fiduciary duty, and gross negligence (page 2of 9). The case references Milonas v. Williams (unpublished). The District Court alleged that Milonas, an independent institution, was a state actor for the purposes of 42 & 1983 and the Tenth Circuit Affirms. Black's Law Dictionary defines stare deciis as "to abide by, or to adhere to, decided cases". This case is one of a kind. Its uniqueness presents a challenge to the *Feris doctine*. Even if can be shown that plaintiff made procedural errors, exceptional circumstances warrant correction to miscarriage of justice. **Substantial Justice** is raised because of the integrity of the court record. The court shows plaintiff's response to summary judgment was entered on about 11: 44 hours on 1 February 1999 (CR 904). Yet, plaintiff plaintiff's emergency fax and motion was not part of the record nor is plaintiff's response to defendant's motion. The date was taped over (CR 905). The record gives the appearance that the summary judgment was not filed until 9 February 1999 with the notice of appeal. Plaintiff is experienced with duty logs, arresting criminals and was a custodian for Army secret and top secret intelligence reports. Why wasn't the record marked unfiled as with other court documents. **Subject Matter Jurisdiction** is disputed. In fairness the court may sever any part of the claim that the court felt was out of its jurisdiction and remanded it to the appropriate court. In a ruling 8 September 1998 in Stoneburner vs Secretary of the Army (W. District 97-50765), 5th Circuit addresses a meritorious challenge concerning the Army Board for Military Records. Boswell unlike Stoneburger, identified a legitimate protective class, and has succeeded in showing that the TCU had an **irrational basis** for dismissal. Texas Whistle Blower George Green

was made whole again. Plaintiff was not. This is an issue in dispute. In Newth, Newth was promoted two grades ahead. In Cole , Cole was promoted one grade ahead. Accountability is requested for the negligence. Trial is requested to prove conspiracy and the disputed issues. On page 40 of the court record foot note 4, plaintiff notes the Inspector General's remarks: "We note that Army Regulation 623-105, section IV, paragraph 5-30b. (1) (a) and (b) states that a commander may determine an officer evaluation report has serious irregularities if one of the rating officials has had substantiated findings against them from an official investigation or lacks objectivity or fairness". Prior to the submission to a FOIA request, the government held that there was no evidence of additional reprisal. Yet when the government responded 15 April 1999 with 245 pages of documentation, plaintiff was surprised that this documentation contained a finding of reprisal. How does the government escape accountability from withholding this incriminating evidence. The investigation was conducted in 1997. This misconduct prevented the non moving party from using this damaging evidence in trial proceedings. Without this information, the District Court and higher courts are unable to render judgment fully, fairly and impartially. This violating rule **60(b)(3).** The production of this evidence was clearly called for CR 1238, Government Fin. Servs v. Peyton Place, inc 62F.3d 767,772 (5cir.1995). This gave the government during District Court and Appellate procedures an unfair advantage. The district court erred not to get to the root of the conspiracy. Misrepresentation of testimony was reported to the Army Criminal Investigation Command and the Civil Rights Division, FBI. Therefore, at dispute is TCU claim that plaintiff failed to report to a law enforcement agency, an issue of material fact. The fact is that Lieutenant Colonel McCarthy, the officer who was responsible for the 1st reprisal lied under oath. He had knowledge of an adulterous affair, and was responsible for security violation. The CID report contains the misrepresentation and misconduct by TCU employees. A factor is the **injury to daughters and to ex-wife.** Hospitalization of the ex wife and one daughter for depression, on or about 19 April 1999 through 7 May 1999 has been a significant distraction. Now there is evidence of TCU manipulation. The public and community has interest. Lieutenant Colonel Bright admits:

"Major Boswell, tenaciously, reported violations of military and university policy dealing with sexual harassment and misconduct, discrimination concerning minority students and cadre, and misapplication of fiduciary property".

The district court was obliged to hear new evidence. Plaintiff notes that military officer Major General retired David Hale performed as one of the Army Pentagon's most senior Inspector Generals. Plaintiff feels that the Office of the Army Inspector General under Hale's tenure and leadership has improperly influenced this case. He was convicted of sexual impropriety. Taking a stand on Boswell's case would highlight his own misconduct. Therefore, there was a centrifugal force in protecting the chain of command at plaintiff's expense. When considering the **precedence in the Dallas County District Court.** Unlike what appears to be fairness in Dallas, Ft Worth District Court appears to be protective of TCU and senior Army Officials. Plaintiff notes that Dallas visiting Judge John Wittington of the Dallas County District Court imposed a fine of $ 2,500 on Major General Hale on November 1998 for harassing his chief accuser of a slander suit. Plaintiff feels the Fort Worth District Court was not assertive in identifying the harassers responsible for retaliation in the workplace. There was an obvious problem at TCU and a cover up of the violations of statute. Plaintiff had convincing evidence on Dean McCracken, Major General Dennis, Major General Wagner, Brigadier General Williamson, Major General James, and Major General Lopez. Had the District Court took similar action as Judge Wittington, justice could have been preserved and additional injury could have been prevented. It is reasonable to conclude, based on the record, that an institution bias exist with regard to TCU and Army officer actions and protected nature. The DoD IG, Army Discharge Review Board, and Texas's Veterans Commission draw identical conclusions: Investigative fact finding was seriously lacking. This deserves Supreme Court intervention. The **Navy Captain recommended the Army Colonel be disciplined**. Plaintiff was involuntarily terminated instead. In Major General Hale's case, the accuser was a witness against the General in official Army investigations. His accuser gave media interviews alleging that that the General forced her to conduct a sexual affair. As was the accuser in Major General Hale's case, plaintiff was also harmed. In Hale, this retired Army General was "fined $ 10,000" and "struck a deal" (CR exhibit TT), after pleading guilty to conduct unbecoming an officer. Plaintiff took

reasonable avenue to make the harassment complaint known to management. Plaintiff argues the participation of a protected activity and knowledge of that activity by defendants. The **Continuing Claim doctrine** applies. Plaintiff was victim of repetitive retaliation. Plaintiff's action served legitimate interest. Under theories of negligence and conspiracy, a jury was requested to review issues of material fact and confirm or deny consequential injuries naturally flowing from the employer's wrongful conduct, such as pain, suffering, and loss of reputation. It is significant that Army Equal Employment Opportunity Compliance and Complaints admission that the Army made the wrong decision and characterized it as *arbitrary* and contrary to the principles of equity. The court could have considered another Army Colonel's death threat as giving an appearance of malice aforethought and reckless indifference to an unjustifiable high risk to human life. **United States is "a" real party in interest.** The United States has an interest similarly to this circuit's precedence describing the United States as "a" real party in interest in Searcy v. Phillups Electronics North America Corp., 117 F.3d at 221 (5th Cir. 1997). Appellant's case also has characteristics of a qui tam suit Title VII violation against a private organization. 5th Circuit Indest v. Freeman, 5th cir. 30 March 1999. Plaintiff's actions for reporting the violations served a legitimate public interest. **29 CFR & 1604.11 (a) (3)** prohibits an unreasonable sexually hostile environment. Burlington Industries, Inc v. Ellerth 118 S. Ct. at 2265 and Faragher v. City of Boca Raton 118 S.Ct. 2283-84 and Indest v Freemon 5cir. 30 Mar1999. Plaintiff was completely surprised at the retirement briefing. On 14 January 1999 plaintiff participated in a **retirement briefing** at Fort Hood Texas. Miraculously, the military officer in charge of executing TCU conspirators orders was Lieutenant Colonel Bright. LTC Bright was at this very same briefing on the same day, same location, at the same event. Lieutenant Colonel Bright was Major Bright on December 1986 when TCU wrongfully terminated plaintiff. Bright and plaintiff was under the authority and line of communication, the direction and oversight, and administrative oversight of Dr. Dean McCracken. Texas Christian University in their response to discovery **denies** (1) that any reprisal actions occurred, (2) responsibility for negligence (3) that plaintiff was entitled to redress procedures, (4) that TCU had duty to ensure plaintiff's rights were protected, (5) **that plaintiff reported racial discrimination** (6) **that plaintiff received disparate and reprisal treatment**. TCU further claims that TCU **was unaware** of any

(1) negligence on behalf of plaintiff (2) of any damaging testimony defaming or against plaintiff (3) of knowledge of plaintiff and daughter's detainment, of the search, or escort to the hospital. TCU states that the university experienced no role in briefing the cadets. TCU **admits** that (1) the Dean had direction and oversight and administrative oversight of ROTC affairs, (2) that TCU was in acceptance of a check of $ 2,635 (3) that the Dean approved plaintiff's assignment and admits to requesting that plaintiff's assignment be discontinued, and (4) that the cadet fund be operated in accordance with university standards, (5) that plaintiff reported what he believed to be violations of federal and state statutes and violations of laws under the provisions of the university handbook to Dean McCracken. **Army Lieutenant Colonel Jay Bright refutes TCU denials**. As an aside, the difference in retirement pay from Lieutenant Colonel to Major equals approximately $ 500 per month. Plaintiff may have also retired as Lieutenant Colonel and continued his appointment at TCU. A condition of employment was to condone the operations and manner in which females and minorities were treated. By doing so plaintiff would be consciously violated the constitution, university and army written policy, and state and federal statutes. Plaintiff suggests that this unintentional and seemingly divine link up with LTC Bright was incredible for several reasons . (1) LTC Bright agrees to be a witness at the plaintiff's civil trial. Major Bright responded under orders as the officer in charge of violated plaintiff's daughter and plaintiff's constitutional rights. Deprivations included an order to silence, bar from the university, unlawful restraint, search of property, and false imprisonment. (2) Miracle number two is that on 14 January 1999 learns about a crucial event of the conspiracy which took place twelve years and ten months before this significant date. LTC Bright informs plaintiff that one of the four witnesses and victims concerning the racial discrimination, of which plaintiff reported and complained about to the authorities, mysteriously disappeared shortly after plaintiff was relieved from ROTC duty. Retaliation for opposing the discrimination was clearly a violation of public law. An Army Inspector General Report validates, by name, the four minority members victims and provided a copy of the investigation to TCU. Sergeant Dunlap was one of the victims. He had agreed to be a scheduled witness at an investigation at which time I was defended allegations fabricated by the accused. I was relieved without opportunity to bring any of the victim witnesses. This event occurred at the height of cover up. Plaintiff asserts

that probable cause exist to question the disappearance of Staff Sergeant Dunlap's and connection to plaintiff's removal action for three reasons: (a) Staff Sergeant Dunlap made a commitment to plaintiff and was prepared to testify in plaintiff's behalf concerning Plaintiff's grievance against the conspirators. (b) Testimony will show he was last seen crying in discussion with one of the conspirators, Lieutenant Colonel Stacy. Staff Sergeant Dunlap's disappearance has reportedly, never been resolved. (c) A jury is expected to assess plaintiff's credibility in the same manner as two Army Boards - the Army Discharge Review Board and the Army Board for Correcting Military Records. The jury may also review statements prepared by other university cadet victims that suffered injury due to TCU's actions. Regardless, an inference is made that the same motive that caused deprivation of plaintiff's procedural due process and subsequent injury, also, contributed to Sergeant Dunlap's mysterious disappearance. The Texas governor and legislature places importance on educational goals. A public school teacher performs an important governmental function. He influences students' attitudes about government, the political process, citizenship. An Associate Professors of ROTC at a university, whether it be state or privately funded, has a similar obligation. In the Texas Whistle Blower Act its speaks of the *collective acts of the agency, the bureaucracy, the institution, the system that retaliates.* Plaintiff's case has applicability. Dean McCracken, Lieutenant Colonel Stacy, military officers, to include General officers, conspired to wrongfully discharge plaintiff from Texas Christian University. Plaintiff was punished for challenging the integrity of the University and Army systems. Plaintiff served his country honorably. This was humble price for the University and Army 's error. Plaintiff was allowed no career progression, and was denied awards, schooling and positions. Plaintiff is grateful that the injustice and inequity is partially corrected and that there still may be equity by a favorable ruling in this honorable court. The injury is real, immediate, and sustained. Disparity is shown. Consider the career pattern of Plaintiff's former boss Chief of Staff of the 1st Armored Division, (now General Tillelli) who endorsed a recommendation for Plaintiff promotion to Lieutenant Colonel and selection for battalion commander. During the same ten year period, plaintiff's former boss went from Colonel, to Brigadier General, to Major General, to Lieutenant General, to General, an increase of four ranks (grades). Plaintiff was lowered from the Officer grade of Major to the enlisted grade of sergeant, and meanwhile, was requesting redress

through the Pentagon's bureaucracy. Plaintiff requested reinstatement to the grade of Colonel (06) a promotion of only two grades from Major (04). In December 1998 promotion to one grade higher to the grade of Lieutenant Colonel was denied. Other officers have succeeded. **Public Law 103-337 Oct 5, 1994 108 STAT 2947 & 14502** requires that an officer eligible for promotion must appear before the special selection boards. The Army's Office of Personnel Management controls if not highly influences the promotion board through summaries, recommendations, connections and instructions to board members. Army's Office of Personnel Management provided a summary to the Army Board for Correcting Military Records concerning the plaintiff's case. It states: no violations of regulations occurred. It is dishonest. Again, this is another example of misrepresentation and obstruction to justice. Under the Feres doctrine, Army's senior management can respond untruthfully without accountability. This hurt to fellow soldiers and the loss of credibility to the Armed Services is Plaintiff's driving force for taking a stand and pursuing litigation, even as a pro se litigant, who is generally expected to fail. Plaintiff requests the judicial system intervene to achieve balance in governmental affairs and compensate for the damage that the *Feres* interpretation has caused. When children and community enter the public work place, as they did in the Texas National Guard Armory and at the TCU campus in Fort Worth Texas, they need to be confronted with professionalism and not witness violation of state and federal statutes as the the showing of pornography in the work place or from news coverage of my colleague who was charged with soliciting sex from a thirteen year boy and possessing nude children photographs. The court can reciprocate. Federal courts need to enforce state law when a federal statute specifically incorporates state law or when federal law is lacking. Plaintiff requests that the Texas Whistle Blower statute and **TITLE 38 U.S.C.A. Paragraph 2021** apply. Veterans of the Vietnam Era, which plaintiff is, may not be discriminated against by employers with significant government contracts in the initial hiring, promotion, training, **discharge**, or status. Paragraph **4311 (c)** states that an employer may not take any adverse action against any person because such person has taken an action to enforce a protection afforded any person, has testified or otherwise made a statement in or in connection with any proceeding or has assisted or otherwise participated in an investigation, or has exercised a right. This act may be enforced by private judicial action (Alabama Power Co. v Davis (S.Ct.1977). **38 U.S.C.**

(Public Law 103-353) Paragraph 4312 concerning the reemployment rights of persons who serve in the uniformed services is to be considered as a standard when applying damages. Plaintiff provides an exception to the five year rule for reemployment due to the conspiracy and fact that the plaintiff was unable to acquire an order for reassignment. Reemployment is allowable under paragraph 4312 (c) (2) if such inability was through no fault of the person. Paragraph 4316 entitled Rights, Benefits, and Obligations of Persons absent from employment for service in a uniformed service states that a person who is re-employed is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed. The court will want to make some provision for TCU to restore and compensate for the loss of educational benefits. Although the agency has made provisions for back pay and retirement pay, Plaintiff reports to the court that neither TCU or the agency has provided compensation damages or seniority and other rights and benefits that plaintiff would have attained had Dean McCracken not conspired against plaintiff. Had Plaintiff condoned the misconduct instead of whistle blowing he to would have completed a Doctorate Degree at TCU. Plaintiff's settlement has not compensated for this loss of education opportunity and future benefits arising out of the employment, for the ten years of default in the officer profession, and for the expected benefits and interest from the backpay, and investments from the pay. The court is requested to acknowledge that the Plaintiff was severely penalized. If an employer were permitted with impunity to hinder career progression or to discharge an employee for fulfilling an obligation to report violations of state and federal statutes, the community would lose benefit. Texas Christian University had a role to teach young impressionable cadets to become superior officers. Failure to teach and practice adherence to law and military regulation adversely affects these future officer's character, values, and military grooming and therefore effects the public and community. Plaintiff had a public obligation to respond in good faith when he learned of the wrongdoing. Evidence suggests that Military and University officials willfully ignored this obligation. Another disparity is the unequal treatment between the District Courts of Dallas and Fort Worth. Dean McCracken and Lieutenant Colonel Stacy escaped accountability. Plaintiff reports that an audit revealed that the conspirators operated the

fund inappropriately and in an unlawful manner for at least three years. In February 1998 a federal judge in Dallas sentenced Dr. Yvonne Gonzalez to fifteen months in prison for misapplying $ 16, 000 in funds. When plaintiff reported misapplication of $ 14,000, under the direction of Dean McCracken, Plaintiff was barred from campus and from speaking with students and faculty (CR exhibit 10 and 11). **Immunity - no longer represents the first line of defense for governmental units.** The doctrine of *Feres*, denies tort recovery for injury through government negligence regardless of intent for service members. This immunity does not apply to the injury caused by Texas Christian University. Notably, there is no provision in the statute to this effect. In Rice v. United States 5th Cir, 1980, 630 F.2d. 1068 and Broudy v. United States , 9th Cir . 1981, 661 F.2d 125 and Kohn v. United States, 2d Cir. 1982, 680F.2d 922. Independent injury to family members are actionable. The Supreme Court has limited the liability in Tort claims to cases which there is fault in the sense of negligence and intent. The United States has consented to liability for "unjust conviction" under a separate statute, **28 U.S.C. A. 1495, 2513. Statute 42 U.S.C.A. 233 (e)** provides specific provisions when the government is liable arising out of negligence. The government can not violate existing procedural standards in denying a hearing. If so, immunity disappears. Myers & Myers v. United States Postal Service, 2d Cir. 1975, 527 F.2d 1252, 35 A.L.R.Fed. 466. Prosser and Keeton propose that "The most striking feature of the tort law of governmental entities today is that the immunities, once almost total, have been largely abolished or severely restricted at almost all levels, often through a complex process in which scholars, and commentators, judges, and legislators all played an important role. To a large extent it appears that the change will continue, and the day may be at hand when the immunity as traditionally known no longer represents the first line of defense for governmental units". See Prosser and Keeton on torts 6th reprint 1995, p 1055-1066. The court has opportunity to apply the same standards concerning immunity as was applied to Plaintiff's Green case, Texas Dept. Human Resources v Green No. 3-92-059-CVTex.App.Austin,1993,nw.h at pg 8. Defendant claims for relief were insufficient. TCU may not be a state or local governmental body, but according to Texas Christian University's stipulation of fact, TCU received government money of $ 6, 119,000 million for one year. TCU governing and accreditation authority is a state agency board governed by the Texas legislature. TCU is required to report University crime

to a Federal education agency governed by our federal legislature. Given these associations with government agencies, and in the absence of federal whistle blower protection, the Texas Whistle Blower Law established in 1983 may apply in accordance with the doctrine of res ipsa loquitur. It is therefore correct and proper for this federal court to use the Texas Whistle Blower statute as a standard of care for TCU violation of the statute. Federal courts are directed to follow the tort law of the state in which the tort occurred. The tort claims act specifically recognizes that liability may be imposed for omissions as well as for affirmative acts. For this reason Texas Christian University may be held for negligent failure to act as well as for affirmative conduct, provided that applicable state law would impose a duty to act upon a private person similarly situated. Plaintiff alleges the state agency has an interest when Dean McCracken authorized an upgrade in grades of ten of plaintiff's ROTC students, especially if the action was in exchange for students to keep quite concerning the conspirator's actions and for the protection of the university's image. Consider the scandal and damage caused by the high profile case and conviction of the Sergeant Major of the Army. The Sergeant Major of Texas Christian University Army ROTC committed a similar crime. They are of equal rank E - 9. Media coverage of this case would certainly affect TCU donors. Now the private sector has competing interests with State and Federal interests. It may have been in the best interest from the University's perspective to remove plaintiff from the picture; but this sort of action is what is protected under the whistle blower statute. One of the University's outstanding donors and alumni corresponds to the Chairmen and Members of the Board of Trustees stating that **"Plaintiff was wronged by the institutions of Texas Christian University and the United States Army. TCU should recognize and bear responsibility for these wrongful actions".** Consider that the highest ranking ROTC military senior Command Sergeant Major violated military adultery laws, federal and state sexual harassment law, and that the conspirators **misapplied fiduciary property state law 32.45. Defendant claim that Plaintiff was not TCU's employee is controversial and contrary to EEOC ruling.** Plaintiff was provided with University catalog revealing rights, reinforced by verbal promises and tangent privileges, backed up by a Defense ROTC contract which led Plaintiff to believe that he was a University faculty member and as such represented the University, the Ft Worth community and that of a federally employed officer conditioned to

uphold regulation, law, and the constitution. Plaintiff was permanently assigned for a minimum of a three year commitment with duty at TCU. It will be clear to a jury by review of Texas Christian University's organizational chart structure and by the **Handbook for Faculty and University Staff's** definition of channels of authority and Communication (page 9) and from the stated facts concerning the controversy that Dean McCracken certainly had an employer obligation. On page 11 of the handbook, it states "The faculty of Texas Christian University shall be defined as personnel holding full-time academic-year appointments, with the rank of instructor, associate professor, or professor. Plaintiff's title was Associate Professor of Military Science and was promised a three year full time academic year appointment. Besides protection against conspiracies under civil rights statutes, Plaintiff notes **Public Law 103-353 (October 13 1994) paragraph 4301** as affording protection against discrimination and disruption. Two of the purposes of the law are to minimize disruption to the lives of persons pertaining to the uniformed services and to prohibit discrimination against persons because of their service in the uniformed services. Any controversy concerning standing should be resolved in favor of the party who has exercised duty in good faith. The court's application to the standard of public law **103-353** is as follows: Paragraph **4303** describes the term employer as "the term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities. Plaintiff emphasizes the **or.** The Dean was not responsible for salary and wages; however, the Dean had control and approved United States Army recommendation to appoint plaintiff as an Associate of Military Science professor for a minimum of a three year permanent assignment. The Dean had control over plaintiff's opportunities and his removal from the University. Plaintiff viewed TCU as the employer. **Defendant claim that there was no report to a law enforcement is a disputed issue.** Plaintiff reported his allegations to the Office of the Inspector General and later, after evidence of conspiracy surfaced, plaintiff reported his allegations in a five page sworn affidavit to the Criminal Investigation Division, Ft Hood Texas and to the U.S. Department of Justice Federal Bureau of Investigation. Meanwhile it is assumed that either the justice department or Inspector General investigated the disappearance of one of plaintiff witnesses. The FBI forwarded the allege misconduct on the part of defense employees and Defense contract employees to the

Department of Defense Inspector General on or about January 17, 1995 (exhibit 4, original petition). On July 19, 1995 the Department of Defense released a final and complete report and finding of Public Law 100-456 providing that retaliatory personnel actions are prohibited with respect to any person communicating with Member of Congress or Inspector General. The criminal investigation division from the local Air Base interviewed the Sergeant Major accused of the sexual assault but as Major General Hale retired from the military under pressure, so did TCU's ROTC Sergeant Major who was accused of sexual impropriety. Lieutenant Colonel Bright was interviewed by an investigator concerning the disappearance of Staff Sergeant Dunlap. **Defendant's response that the claim was not timely filed is incorrect**. Plaintiff filed numerous timely requests for redress and each response required plaintiff to pursue administrative remedy. Under state whistle blower statutes and that of federal regulations, administrative remedies must be pursued before filing a claim. The agency must complete final action. Under Texas Whistle Blower Law, this time is tolled. It took great persistency and faith in the system to continue administrative remedy ending in a Department of Defense appeal adjudication in November 1997 and agency final decision in December 1998. Plaintiff also disagrees that this is a Nonjusticiable Claim. On December 10, 1998, the Department of Army provided orders revoking Plaintiff's discharge orders from the Army and providing retroactive retirement orders, effective May 1993 as an Army Major 0-4. Since January of 1992, plaintiff has performed as a Sergeant E-5, in humiliation and mental anguish, all because TCU denied plaintiff's basic constitutional rights of due process and redress procedures. TCU's claim is that they did not false imprison the Plaintiff. The Dean may not have personally accomplished this task, however, he was in control of who did. Plaintiff was involuntarily searched, essentially arrested, and escorted for admittance to an Armed Services Psychiatric hospital. Plaintiff's twelve year old daughter was also arrested, placed in the Army staff car involuntarily and witnessed the events. Plaintiff alleges that TCU actively participated in a coconspirator role. Plaintiff requests that the alleged negligence in controversy and this dispute be decided by jury. A United States Supreme Court decision in remand would allow a jury to decide whether TCU took appropriate employment actions, whether TCU violated the Plaintiff's constitutional rights, and whether TCU was negligible for contractual and promissory violations. **Defendant claim concerning the**

family and leave act is correct. I did not mean that it should be taken literally. Plaintiff's point was to show the Armed Forces standard for care and remedy for caring for family members, a principle that United States defendants violated by denying plaintiff leave and substituting deceptive and illegal overt actions as a form of retaliation for reporting violations of state and federal statutes. Plaintiff asserts that the reckless act of frightening and forcing plaintiff's daughter in a military staff car under the pretense of a forced escort could have been remedied by compliance with the family leave act. Appropriate action would be to allow plaintiff to take leave to care for daughter verses exposing daughter to the malicious act of the intentional infliction of emotional harm. Compared to the larger issues, this issue is small and will receive little, if any attention at trial. But from a DaD, perspective this issue is paramount because it has affected the daughter's standing in the community. TCU asserts plaintiff is white and this is correct. The law is written for all Americans. We all must guard against discrimination. Pplaintiff, regardless of color of race, is afforded protection against conspiracies against civil rights under 18 U.S.C. & 241. Plaintiff explains that several black cadets and cadre members were discriminated against because they were black. Plaintiff received the discrimination reports. They were provided by four black personnel (Cadet Hobbs, and Cadre members Fant, Brown and Dunlap). Plaintiff affirmed that the allegations were probably true forwarded the allegations to the Inspector General. Prior to the Plaintiff's employment at Texas Christian University, a black senior non commissioned officer in Army ROTC experienced retaliation. He states that his removal was groundless and unjustified and that he objected to the same improprieties, as the plaintiff. He states that attempts were also made to discredit him. A continuing pattern of retaliation treatment is shown by examining his statement in the record which has since been made into a sworn affidavit in excruciating detail and provided to the district court as new evidence, with additional affidavits, to the motion to reopen the case. Junior and Senior Cadets and cadre are under an employment contract. Plaintiff firmly witnessed abuse. The disappearance of the black sergeant was reportedly investigated by authorities. Plaintiff questions TCU rationale for the failure to provide this significant report during the discovery process. It is within the court's authority pursuant title **29 U.S.C. 440** to impose a fine up to **$ 10,000** or imprisonment for not more than one year for withholding or concealing such a significant report. No doubt

this report would have given plaintiff an equal advantage. TCU moved for summary judgment as to all of plaintiff's claims because they are barred by any applicable statute of limitations or by the doctrine of laches. In 1997 Supreme Court decision in Bay Area Laundry vs. Ferba, ruled that the six year statute of limitations begins running after a payment is missed. Each time since April 13 1989 that plaintiff did not receive an employment check because of TCU negligence, using this precedent, the six year clock would begin running each time the plaintiff missed a check. In the case with Louella Nicholas vs the United States, a federal judge denied a request for the case to be dismissed even after 10 years had elapsed from the first missed payment. Lou Nicholas began writing members of Congress. So did plaintiff. It was during the Department of Defense Whistle Blower investigation that the facts concerning the conspiracy became known. The court can toll the statutory period for filing on grounds of basic fairness and due to no fault of the plaintiff. Consider **Chapter 4323, Title 38 U.S. C**. enforcement of rights with respect to a State or private employer, paragraph (c) (6) as a precedent. It States that no state statue of limitations shall apply to any proceeding under this chapter. A cause of action accrues and the statute of limitations begins to run when a plaintiff is armed with the facts about the harm done to him. United States v. Kubrick, 444 U.S. 111, 123 (1979). Federal Plaintiff's are required to exhaust all administrative remedies prior to filing suit. Plaintiff has complied. The harm continues. Concerning **Doctrine of Laches,** the implication is that plaintiff failed to take the appropriate action at the proper time. At what point can plaintiff be faulted for not acting appropriately? Plaintiff has always desired to mitigate damages and request redress. TCU does not escape liability because Plaintiff diligently exercised administrative remedies. Plaintiff's suspicion of the conspirators intent and illegal conduct was the defendant's motive for directing that plaintiff be removed. The question to the court is whether Dean McCracken breached his duties as the overseer of ROTC Affairs. Plaintiff feels that Dean McCracken beached his duties because plaintiff alleged he was suspect to criminal liability because of the $ 14,000 of cadet money that was spent without University student consent. Plaintiff's exhibit, a check made out to Texas Christian University for $ 2,765, is evidence that would certainly question Dean McCracken's role. Other factors for the court's consideration is that Dean McCracken career professional grew for ten years while plaintiff's career came to a halt. The Dean occupies the same

position as he did when he directed Plaintiff be terminated. The Dean caused plaintiff to receive a relief for cause efficiency rating (since voided and removed from the record). and during the entire duration of plaintiff's injury from December 1986 to January 1999. The time for commencing actions brought by the United States under **28 U.S.C. 2415** is 6 years after the right of action accrues or within 1 year after the **final** decisions have been rendered by contract or by law, whichever is **later. Final** agency decision resulting in some relief 21 May 1997 well within a year of the filing of this lawsuit on 23 February 1998. Plaintiff discovered a right of action as a result of a Department of Defense Whistle blower reprisal investigation entitled Former Major James D. Boswell. The report was published July 1995 well within the 6 year statute of limitations. The injury was cancerous. It escalated. Plaintiff lost a second career. Plaintiff visited the Dean prior to the plaintiff's removal from the University. Plaintiff's standing at the University was more than that of a trespasser. He was a respected member of Texas Christian's Faculty with credentials of serving six years overseas. He earned the distinction of honor graduate at the United States Army Ranger School. He was largely responsible for the University's standing in ROTC in the Ranger challenge competition, that of number 2 in the nation. Plaintiff was a distinguished graduate of the ROTC, University of Austin program. Plaintiff was privileged to TCU benefits such as tuition free education. Even if plaintiff's standing was that of an independent contractor, TCU still knew of the unlawful allegations of the alleged felonious offenses similar to that of an employer who knew or had reason to know of the danger, and the injury involved in that danger. After confirmation of several pertinent factual conclusions, that (1) plaintiff was wronged (2) that due process was violated and (3) that the decision to eliminate plaintiff from the Army was noted as "arbitrary", plaintiff visited the Dean for a second time and requested that he correct the injury. Certainly, he had moral obligation to correct the injury as a result of liability under the principle of tort of negligence and reckless conduct. It is no fault of the plaintiff that plaintiff's request were ignored and that plaintiff's request for redress were hindered by the powerful senior leadership of the Army and University. In accordance with FRCP 60, Plaintiff requested relief from summary and final judgment. Appellant showed newly discovered evidence, existence of prejudice, a showing of diligence, that the new evidence was significant, material, and likely to produce different results, and

misrepresentation and misconduct on the adverse party and likeliness to produce different results. Stone v INS, 115 S.Ct. 1537,1547 (1995), Appellant requests a new trial Joseph v. Terminix Int'l Co., 17F.3d 1282,1285 (10thCir.1994, vacatur of the district order dismissing United States Defendants, U.S. Bancoorp Mtg. Co. v. Bonner Mall Partnership 513 U.S. 18, 115Scir386,393 (1994), due to genuine new facts, a reasonable jury could return a verdict for the non-moving party. McDonald v. Delt Air Lines, Inc 94 F.3d 1437, 1440 (10th Cir 1996), accountability and liability for punitive damages for exploitation, harassment, and discriminatory treatment of the injured parties, to be whole again and full relief **EEOC 1614.501 as explained in appendix A of part 1613** and tolling for conspiracy, retaliation and discrimination, exhausting administrative remedies, existence of prejudice, the new evidence, and concealment . Plaintiff was completely disadvantaged by economic harm.

i. Army orders, Agency opinions, Materials essential to understanding Appendix I

J. Conclusion. Plaintiff has shown a miscarriage of justice and that the Defendant's argument lacks merit. Plaintiff need not prove that each incident involved an individualized risk of retaliation. Rather, the evidence in the record demonstrates that plaintiff and witnesses to this misconduct reasonably feared sufficiently severe retaliation by the University and DoD agencies to warrant prejudice to the case in each of its litigation stages. The standing aspect of jurisdiction exists to ensure that a court has the power to redress the alleged injury. The injury alleged on which the district court's jurisdiction is premised are defendants' violations of federally protected rights and violation of state and federal statutes. Thus, plaintiff has standing to sue because the district court can redress the whistle blower violations by ordering defendants to pay damages. See Gladstone Realtors v. Village of Bellwood, 100 (1979) (holding that a plaintiff has standing if she has personally suffered some actual or threatened injury as a result of the defendant's conduct). **TCU violated the** enforcement guidance on vicarious employer liability for unlawful harassment by supervisors. In Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged

to avoid or limit the harm from harassment. The Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. It may be of interest to the court that the victim of sexual assault volunteered to take a polygraph but the alibis to the misconduct refused. One alibi now provides the truth, nullifying testimony of the other two. Though sorely tried, my faith in God and our countries leadership continues. As history proves, the United States Supreme Court has responded and acted to remedy a cause of deprivation when no other agency would. I prey that your decision will reward my faith, and I look forward to receiving a positive and just reply.

Petitioner shows departure from accepted and usual practices, articulates principles for public interest, demonstrates widespread implications, fear of employee reprisal, matters of equity, agency conclusions of arbitrary and against principles normally employed, and conflict with rulings with the other appellate circuits and Supreme Court rulings.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jim Boswell

Jim Boswell, Pro Se

June 12, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10161

JAMES D. BOSWELL,

Plaintiff-Appellant,

versus

WILLIAM COHEN, The Secretary of Defense; ET AL.,

Defendants,

U.S. COURT OF APPEALS
FILED
MAR 17 2000
CHARLES R. FULBRUGE III
CLERK

TEXAS CHRISTIAN UNIVERSITY; WILLIAM E. TUCKER, DR., Chancellor; MICHAEL D. McCRACKEN, Dean,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:98-CV-168-Y

ON PETITION FOR REHEARING EN BANC

Before JOLLY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

(✓) Treating the petition for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rule of Appellate Procedure and Local Rule 35), the petition for Rehearing En Banc is DENIED.

( ) Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of the judges and a majority of the judges not having voted in favor of it (Federal Rule of Appellate Procedure and Local Rule 35), the petition for Rehearing En Banc is DENIED.

Moreover, Boswell was warned that a baseless petition for rehearing en banc could result in sanctions against him. Nevertheless, Boswell persisted in presenting a baseless

petition. Accordingly, IT IS ORDERED that Boswell is sanctioned in the amount of $100, to be paid to the Clerk of this court within 30 days of the date of this order.

FOR THE COURT:

RHESA H. BARKSDALE
UNITED STATES CIRCUIT JUDGE

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 16 1999
CHARLES R. FULBRUGE III
CLERK

No. 99-10161
Conference Calendar

JAMES D. BOSWELL,

Plaintiff-Appellant,

versus

WILLIAM COHEN, The Secretary of Defense; ET AL.,

Defendants,

TEXAS CHRISTIAN UNIVERSITY; WILLIAM E. TUCKER, DR., Chancellor; MICHAEL D. McCRACKEN, Dean,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:98-CV-168-Y

Before JOLLY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

This court must examine the basis of its jurisdiction on its own motion if necessary. *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). A timely notice of appeal is a prerequisite for the exercise of jurisdiction by this court. *United States v. Carr*, 979 F.2d 51, 55 (5th Cir. 1992). A petitioner has 60 days from the entry of judgment to appeal from the dismissal of a civil

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

PSR

Appendix B-1

action in which the Government, its agencies, or officers are parties. FED. R. APP. P. 4(a)(1). "A document filed in the period prescribed by Fed. R. App. P. 4(a)(1) for taking an appeal should be construed as a notice of appeal if the document 'clearly evinces the party's intent to appeal.'" *Mosley*, 813 F.2d at 660. A pleading that seeks reconsideration of an order of the district court is not effective as a notice of appeal, even if labeled a notice of appeal. *Id.*

In his notice of appeal and accompanying memorandum, James Boswell requested that the district court compel discovery, vacate the order denying him an extra day to respond to the defendants' summary judgment motion, and schedule a hearing on the summary judgment motion. Boswell's notice of appeal did not clearly evince his intent to appeal, and Boswell filed no pleading subsequent to his notice of appeal that could be construed as a notice of appeal. We lack jurisdiction over Boswell's appeal. Finally, Boswell's motion to supplement his reply brief with an appendix is DENIED.

APPEAL DISMISSED.

ORIGINAL

FILED

JAN 29 1999

NANCY DOHERTY, CLERK

By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JAMES D. BOSWELL §
§
VS. § CIVIL ACTION 4-98-CV-168-Y
§
THE SECRETARY OF DEFENSE, ET AL. §

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pending before the Court is Texas Christian University's Motion for Summary and Final Judgment, filed by Texas Christian University, William E. Tucker, and Michael D. McCracken on October 20, 1998 [doc. # 23-1]. Having carefully considered the motion, and noting that as of the date of this order no response has been filed, the Court finds that the motion should be granted.

Summary judgment is proper when the record establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). To determine whether there are any genuine issues of material fact, the Court must first consult the applicable substantive law to ascertain what factual issues are material. *Lavespere v. Niagra Mach. & Tool Works*, 910 F.2d 167, 178 (5th Cir. 1990), *cert. denied*, 114 S.Ct. 171 (1993). Next, the Court must review the evidence on those issues, viewing the facts in the light most favorable to the nonmoving party. *Id.; Newell v. Oxford Management Inc.*, 912 F.2d 793, 795 (5th Cir. 1990); *Medlin v. Palmer*, 874 F.2d 1085, 1089 (5th Cir. 1989).

In making its determination on the motion, the Court must look at the full record including the pleadings, depositions, answers to

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Appendix C-1

interrogatories, admissions on file, and affidavits. FED. R. CIV. P. 56(c). *See Williams v. Adams,* 836 F.2d 958, 961 (5th Cir. 1988). Rule 56, however, "does not impose on the district court a duty to sift through the record in search of evidence to support" a party's motion for, or opposition to, summary judgment. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). Thus, parties should "identify specific evidence in the record, and . . . articulate" precisely how that evidence supports their claims. *Forsyth v. Barr*, 19 F.3d 1527, 1536 (5th Cir. 1994). Still, the Court's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

To prevail on a motion for summary judgment, the moving party has the initial burden of demonstrating that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A defendant moving for summary judgment may submit evidence that negates a material element of the plaintiff's claim, show that there is no evidence to support an essential element of the plaintiff's claim, or present evidence supporting an affirmative defense. *Celotex Corp.*, 477 U.S. at 322-24; *Buck v. FDIC*, 75 F.3d 1285, 1289 (5th Cir. 1996); *Crescent Towing & Salvage Co. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994); *Lavespere*, 910 F.2d at 178.

To negate a material element of the plaintiff's claim, the

defendant must negate an element that would affect the outcome of the action. *Anderson*, 477 U.S. at 247. If the defendant moves for summary judgment alleging no evidence to support an essential element of the plaintiff's claim, the defendant need not produce evidence showing the absence of a genuine issue of fact on that essential element. Rather, the defendant need only show that the plaintiff, who bears the burden of proof, has adduced no evidence to support an essential element of his case. *Celotex*, 477 U.S. at 325; *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 379 (5th Cir. 1988). If the defendant moves for summary judgment on the basis of an affirmative defense, the defendant must establish all elements of the defense to prevail on summary judgment. *Western Fire Ins. Co. v. Copeland*, 651 F. Supp. 1051, 1053 (S.D. Miss 1987), *aff'd*, 824 F.2d 970 (5th Cir. 1987).

When the moving party has carried its summary judgment burden, the respondent must go beyond the pleadings and by its own evidence set forth specific facts showing there is a genuine issue for trial. FED. R. CIV. P. 56(e). This burden is not satisfied by creating some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.2d 1069, 1075 (5th Cir. 1994). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50.

Here, Texas Christian University, William E. Tucker, and Michael D. McCracken move for summary judgment on Plaintiff's

claims against them because (1) Texas Christian University is not a state or local governmental body, (2) Plaintiff was not an employee of Texas Christian University, and (3) Plaintiff cannot otherwise establish a cause of action against the moving defendants under any theory alleged by Plaintiff. The Court agrees. Therefore, Defendants' Motion for Summary and Final Judgment is GRANTED, for the reasons stated in the Brief in Support of Defendant, Texas Christian University's Motion for Summary and Final Judgment, filed October 20, 1998.

SO ORDERED.

SIGNED January 29, 1999.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/sbh

ORIGINAL

FILED
JAN 29 1999
NANCY DOHERTY, CLERK
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JAMES D. BOSWELL §
§
VS. § CIVIL ACTION 4-98-CV-168-Y
§
THE SECRETARY OF DEFENSE, ET AL. §

FINAL JUDGMENT

Pursuant to the order issued this same day, and Federal Rule of Civil Procedure 58,

It is hereby ORDERED, ADJUDGED, and DECREED that all claims in the above-styled and numbered cause are DISMISSED WITH PREJUDICE. All costs of Court shall be borne by the plaintiff.

SO ORDERED.

SIGNED January 29, 1999.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/sbh

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FEB - 1 [redacted]
U.S. DISTRICT CLERK'S OFFICE

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C-5

USCA#
(uscanbr./kuscanbr.)

UNITED STATES DISTRICT COURT
Northern District of Texas

Nancy Doherty
Clerk of Court

Fort Worth Division
310 U.S. Courthouse
501 West 10th
Fort Worth, TX 76102

Mr. Charles R. Fulbruge, III, Clerk
U.S. Court of Appeals - Fifth Circuit
600 Camp Street, Room 102
New Orleans, Louisiana 70130 Date: 2/10/99

IN RE: Notice of Appeal

Case Number: 4-98-CV-1684

Style: James Boswell vs Texas Christian University et al

Dear Sir:

In connection with this appeal, we are transmitting certified copies of the notice of appeal and of the docket sheet to your court for processing.

This is a: ___Interlocutory appeal ___Cross appeal ___Amended appeal.

Filing date: 2/9/99.

Appellant: James Boswell, pla.

BY: ____counsel X Pro se

Appealing: Final Judgment 1/29/99

Case presided by Jerry R Means X District Judge
___ Magistrate

APPEAL FILING FEE INFORMATION:

____The Court of Appeals docket fee of $105.00 is paid.

X The Court of Appeals docket fee of $105.00 is not paid:

____CJA counsel appointed, docket item number_____.

____Public Defender appointed, docket item number _____.

____In forma pauperis granted, docket item number _____.

____A motion to proceed on appeal in forma pauperis has been filed.

X A filing fee of $105.00 is due.

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Appendix D-1

to dismiss and motion giving notice of appeal (15+) (bam) [Edit date 06/09/98]

6/9/98 10 ORDER unfiling [9-1] motion to amend judgment-vacature of court order granting dfts motion to dismiss and motion giving notice of appeal by James D Boswell due to the following deficiency: Cert of Service, Cert of Conf, and Order... Copies to counsel: 6/9/98 (signed by Judge Terry R Means) Page(s) 2 (bam)

6/26/98 11 MOTION with memorandum in support by James D Boswell for vacature of court order graning dfts motion to dismiss (15+++) (bam)

7/15/98 12 MEMORANDUM OF POINTS AND AUTHORITIES by National Guard Burea, Secretary of Defense, Secretary of Army in support of dfts opposition to plfs motion to vacate the court order granting dfts motion to dismiss (6) (bam)

8/6/98 13 ORDER denying [11-1] motion for vacature of court order graning dfts motion to dismiss (signed by TRM) Copies to counsel: 8/6/98 Page(s) 1 (bam)

Proceedings include all events.
4:98cv168 Boswell v. Cohen, et al APPEAL

CLOSED

8/12/98 14 NOTICE OF APPEAL (15+) by plaintiff James D Boswell...from dismissal.... Fee payment amount: 105.00 Receipt # 26197; TO given, no hearings/trials held...Cys to Judge and all parties... Appeal record due on 8/27/98 (dld) [Entry date 08/13/98] [Edit date 08/13/98]

8/13/98 -- Notice of appeal and certified copy of docket to USCA: [14-1] appeal (dld)

8/14/98 15 ORDER re request for information, Court refers plf to Local Rules...Court is unable to provide further assistance...for procedural assistance a litigant may contact the clerk of court (signed by TRM) Copies to counsel: 8/14/98 Page(s) 1 (bam)

8/14/98 16 ORDER to show cause by plf why he failed to comply with the 5/26/98 order, and set plf filing deadline for 4:30 8/28/98 (signed by TRM) Copies to counsel: 8/14/98 Page(s) 1 (bam)

8/14/98 -- Transmitted record on appeal to U.S. Court of Appeals: [14-1] appeal consisting of Vol I & II of case papers which includes cert cy of docket entries; along with a transmittal letter. (eac)

8/21/98 17 RESPONSE by James D Boswell to [16-3] show cause order for failure to file joint discovery plan (10) (bam)

8/21/98 18 Justification to Compel US dfts to file joint discovery plan by James D Boswell (12) (bam)

8/24/98 19 ORDER resetting joint status report due for 4:30 9/1/98 denying [18-1] plfs motion to compel the govt dfts previously dismissed from this case, to file jt discovery

D-2

2/8/99 40 ***UNFILED PER 2/9/99 ORDER***MOTION by James D Boswell to vacate [36-1] order denying plf to enlarge time to respond to summary and final judgment (6) (bam) [Entry date 02/09/99] [Edit date 02/10/99]

2/8/99 41 ***UNFILED PER 2/9/99 ORDER***MOTION by James D Boswell for continuance (6) (bam) [Entry date 02/09/99] [Edit date 02/10/99]

Proceedings include all events. APPEAL
4:98cv168 Boswell v. Cohen, et al
CLOSED

2/9/99 42 NOTICE OF APPEAL by James D Boswell and appealing 1/29/99 final judgment...plf is pro se...no hearing/trial held...TO given to plf...no pymt made (15+++) (bam)

2/9/99 43 ORDER unfiling [41-1] motion for continuance by James D Boswell due to the following deficiency: Cert of Conference Copies to counsel: 2/10/99 (signed by Judge Terry R Means) Page(s) 2 (bam) [Entry date 02/10/99]

2/9/99 44 ORDER unfiling [40-1] motion to vacate [36-1] order denying plf to enlarge time to respond to summary and final judgment by James D Boswell due to the following deficiency: Cert of Conference Copies to counsel: 2/10/99 (signed by Judge Terry R Means) Page(s) 2 (bam) [Entry date 02/10/99]

2/9/99 45 ORDER unfiling [39-1] motion to take judicial notice and grant hearing by James D Boswell due to the following deficiency: Cert of conference Copies to counsel: 2/10/99 (signed by Judge Terry R Means) Page(s) 2 (bam) [Entry date 02/10/99]

2/9/99 46 ORDER unfiling [37-1] motion for scheduling of two Hearings: 1) resolution of issues prior to summary and final judgment and 2) the summary and final judgment hearing by James D Boswell due to the following deficiency: Cert of Conference Copies to counsel: 2/10/99 (signed by Judge Terry R Means) Page(s) 2 (bam) [Entry date 02/10/99]

2/9/99 47 ORDER unfiling [38-1] motion to compel defendant's to discovery by James D Boswell due to the following deficiency: Cert of Conference Copies to counsel: 2/10/99 (signed by Judge Terry R Means) Page(s) 2 (bam) [Entry date 02/10/99]

2/10/99 -- Notice of appeal and certified copy of docket to USCA: [42-1] appeal...along with a transmittal letter (csw)

2/16/99 48 MOTION by James D Boswell to vacate [36-1] order denying plf time to respond to summary and final judgment, and to certify order as appealable (8) (bam) [Entry date 02/17/99]

2/16/99 49 MOTION by James D Boswell to compel dfts to discovery (6) (bam) [Entry date 02/17/99]

2/16/99 50 MOTION by James D Boswell for scheduling of two Hearings: 1) Resolution of issues prior to summary and final judgment

D-3

ORIGINAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY 12 2000
NANCY DOHERTY, CLERK
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JAMES D. BOSWELL	§	
	§	
VS.	§	CIVIL ACTION NO. 4:98-CV-168-Y
	§	
SECRETARY OF DEFENSE, ET AL.	§	

ORDER DENYING MOTION TO REOPEN CASE AND RELATED MOTIONS

Pending before the Court are the following motions submitted by plaintiff James D. Boswell, filed April 17, 2000: (1) motion to reopen case for additional evidence; (2) motion for relief from summary and final judgment; (3) motion to file supplemental pleading; (4) motion for court-appointed attorney; and (5) motion for continuance *in forma pauperis*. Having carefully considered the motions, the Court finds that they are without merit and should be DENIED.

Therefore, it is ORDERED that the above-listed motions are hereby DENIED.

SIGNED May 12, 2000.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/val

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MAY 12 2000
U.S. DISTRICT CLERK'S OFFICE

Appendix E

APPENDIX F Jurisdiction

Plaintiff requests that the redress of the wrong to the community be considered as was recently in the State of Kentucky. Former Commander of the Kentucky Army National Guard lost a bid to overturn his 1996 federal perjury conviction, after judges ruled that a statement he made to investigators was intended to mislead them. Former Brigadier General Robert DeZarn had hoped to convince a trial jury that he was being honest. Yet in the October 14 1998 ruling, the U.S. Court of Appeals for the 6th Circuit court upheld the conviction. The Appellate ruling of the District Judge's ruling in DeZarn leaves intact DeZarn's sentence of 15 months in prison and a fine of $ 5,000. The similarity in plaintiff's case is that, likewise, plaintiff shows evidence of perjury and obstruction to justice concerning the failure to provide three separate investigations (September 1997, January 1998, and November 1998). As was accomplished in Kentucky in federal court, Plaintiff shows discrimination and conspiracy, and reprisal and the result of the continuing claim doctrine from one job at TCU to the next at Texas National Guard. Plaintiff holds the University, the Chancellor and the Dean accountable for the TCU reprisal and holds DoD officials responsible for their aid and complementary role. Plaintiff was forced to seek remedy for the third reprisal in a separate action currently being adjudicated by the DoD, Office of Hearings and Appeals. For the third reprisal action plaintiff holds accountable the Adjutant General of Texas, Major General Daniel James, Governor George Bush, and the Secretary of the Army, Louis Caldera.

Employee suits to enforce their statutory rights benefit the general public. See Wirtz v. C & P Shoe Corp., 336 F.2d 21, 30 (5th Cir. 1964) (stating that in a FLSA suit brought by the Secretary of Labor, "the Government becomes an active protagonist for the double purpose of protecting private interests and vindicating public rights"); Plourde v. Massachusetts Cities Realty Co., 47 F.Supp. 668, 670 (D. Mass.1942) ("An employee, exercising his rights under[FLSA],exercises them, not only for his own benefit, but also for the benefit of the general public."); see also Alexander v. Gardner-Denver Co (1974) (stating that a private Title VII plaintiff "not only redresses his own injury but also vindicated the important congressional policy against discriminatory employment practices"). Moreover, as the Supreme Court has recognized, fear of employer reprisals will frequently chill employees' willingness to challenge employers' violations of their rights. See Mitchell v. Robert

De Mario Jewelry, Inc., (1960) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); see also NLRB v. Robbins Tire & Rubber Co., (1978) ("The danger of witness intimidation is particularly acute with respect to current employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage."). Our leadership must impose greater responsibility for actions morally wrong, and for actions that are intended to do harm.

The Defense Office of Hearings and Appeal (DOHA), and **Director, Army Board for Correcting Military Records,** are adjudicating docket number AC95-08841, open case number AR 2000 04 1986 submitted 7 October 1999 and case number AR 1998 01 4369 submitted 30 December 1998. They also are related to whistle blower violations of Title 10 and 1034, involve newly discovered evidence and inveigh the continuing claim doctrine of reprisal with multiple respondents. Interpretation of 32 C.F.R & 562.4 (e) regarding ROTC duty and EEOC regulations are controlling. The head of the institution "The University" exercises control just like any other department, pg 65-66. "Protected activity" means opposition to discrimination. "Fraud" is unlawfully depriving something of value. "Abuse" is an intentional wrong. Applicant shows that after he performed the duty of reporting violations of regulation to the Inspector General, TCU respondents committed unlawful harassment and retaliation. These actions were arbitrary and conducted with malice and with reckless indifference to the employee' federally protected rights. Applicant shows a systemic problem.

The DoD defendants were dismissed from this case. Through ongoing litigation in other forums D.O.D. defendants provide arguments which warrant consideration. Concerning statutory protection of whistle blowers, the federal Office of Special Counsel on 09/10/99 stated that the OSC and MSPB do not have authority to enforce Title 5 U.S.C. because the National Guard is not a federal entity and the Adjutant General is not a federal employee. TCU could have avoided controversy of unlawful harassment and involuntary termination. The Adjutant General of Texas is a State Agency and failed to intervene as requested. Should TCU officials have shown remorse and made any admission of their actions after being apprised of the D.O.D./I.G. finding of

reprisal, and initiated a request for a more favorable outcome to ABCMR and Special promotion proceedings, it would have gone a long way towards making plaintiff whole again. This was not the case. The record shows discrimination and whistle blower activity, the threat of termination, the adverse personnel actions, and a finding of reprisal and request for discipline and cover up. Governor Bush's omission to act was because of political aspirations. To prevent untimely scandal, his protection (by omission and failure to take action) was provided to the accused. Favorable personnel actions in remedy of the previous wrongs to the plaintiff were not recommended because complainant had previously accused General James and staff of violating Federal and Texas whistle blower law. The Adjutant General for Texas relies on legal issues and indicates that any court action, state or federal, is unjustifiable. "The case law is clear that civilian technicians, wear military uniforms and are not entitled to Title VII protection, including claims of retaliation". No mention is made regarding leadership, moral and ethical issues, reflective literature, implied contracts, public interest through the media, or impact to members of the Armed Services and veterans. The DoD is required to afford victims of retaliation priority status, subject to time restraints of Title 10 1034 and DoD directives. DoD inaction has bled plaintiff's financial resources. They are exhausted. Due to the lack of DoD enforcement, accountability, and remedy, I am compelled to continued action to prevent future occurrences to service members, recruits, and cadets. Respondent actions were unlawful and they engaged in conspiracy. The United States Northern District Court dismissed DoD defendants from the case and granted a decision of summary judgment for Texas Christian University. This was a miscarriage of justice. My case to this honorable court as well as to the ABCMR was prejudiced because of a deprived pay entitlement, denied legal assistance from the Guard or representation from Army (DoD) Counsel. Without assistance or the funds that should have been forthcoming, I was unable to pay attorney fees. I have pursued remedy without any expert advice or assistance. I made costly errors. Official reinstatement of commission by the ABCMR did indicate that official misconduct by TCU and DoD had to have occurred. Though the facts exist, no action was considered necessary regarding any disciplinary or criminal prosecution regarding these matters, or the awarding of punitive damages. DoD lacks proactive participation in

protecting and defending service members. All resources are allocated for the protection of the accused. This must be questioned.

Because of a lack of legal assistance, I prematurely filed an action for judicial review of the agency order. Assistant District Attorney Wayne Hughes responded to this action (case 99-60398) in the Fifth\Circuit Court of Appeals that "the court does not have jurisdiction because Boswell has not exhausted administrative remedies". Mr. Hughes attached a supporting affidavit from DOHA. The Fifth Circuit agreed and appropriately dismissed this action, a different and separate one to the suit against TCU. Clearly, the court does not have jurisdiction to review the agency order until I exhaust all administrative remedies through DOHA and the ABCMR. After the Northern District Court of Texas grant of summary judgment for TCU, numerous service members contacted me and subsequently provided me with affidavits showing violation of Title VII and Tile IX. They also supplied me evidence that supported my allegation of Army and TCU fraudulent actions and intentional discrimination. When you request the record you will be able to more clearly see the magnitude of the problem and fear of reprisal.

While ABCMR and Court action proceedings were pending, I performed as a **Sergeant** and federal civil service GS-7 technician in the Texas Guard. Reprisal continued and I pursued action against General James, Adjutant General of the Texas National Guard concerning civil service related whistle blower actions. The Office of Special Counsel and Merit Systems Protection Board responded to my technician complaint that they lack authority to order any corrective action to the Texas National Guard pursuant to Title 32 section 709. Since the MSPB rejected my claim, I filed it with the EEOC and supplied the EEOC with retaliation policy literature inferring that employees are covered under civil service and military federal statutes. GAO report (GGD-00-70) noted that under a 1994 law, agencies are required to inform employees about their legal protections against reprisal for making disclosures. About half the employees surveyed indicated fear of reprisal. Neither military or federal civil service National Guard **technician** employees are provided Title VII and civil rights standing because the courts continue to rule that our actions are incident to military operations. We lack recourse,

recourse which is available to other federal civil service employees. Omission to inform service members of deprivation of civil rights must be questioned.

I pursued a Texas Tort action against state defendants in the State of Texas District Court, Tarrant County; Cause No. 067-182444-00 against General James, Governor Bush, and the Board of Trustees, Texas Christian University. Contrary to the Texas Adjutant General's remarks that these matters are "exactly the same" as the discrimination action EEOC docket number 05A00652, I specifically requested the court to adjudicate "state agent actions" "offenses on state property" "state tort claims". At enclosure 2, page 18, I draw distinction between federal claims and that of separate state whistle blower claims. The EEOC initially denied my claim. Meanwhile, other discrimination complainants contacted me. I now show that discrimination is wide spread. On the April 23, 2000 I requested the EEOC reconsideration and approval for class action status. We - victims of retaliation - remain hopeful that changes in discrimination, retaliation, whistle blower regulations will take precedence over the inadequate system a military serviceman experiences as federal remedy due to *Feres Doctrine*. Under *Feres*,

> **"The inescapable demands of military discipline and obedience to orders cannot be taught on the battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection . . .**

A consideration is that the United States Supreme Court recognize that *Feres* has an opposite and negative effect on the efficiency of the service, especially in peace time e.g. in a University or State environment where DoD employee has duty to guard against sexual misconduct and commander abuse. If the DoD were to conclude that abuse can be traced to the Governor's office, it places the victim of retaliation at greater disadvantage and risk for viable remedy. Degradation concerning fact finding due to fear of reprisal was a significant factor. Now, due to retirement and completion of service contracts, several witnesses freely provide their assessment, affidavits, and evidence of conspiracy. The agency has not yet ruled on this new and controlling evidence.

On 3 May 2000, the EEOC provided a letter acknowledging my request for reconsideration. This is still pending but in jeopardy because on 25 May 2000 the Adjutant General of Texas provided argument for

dismissal. The Adjutant General affirms that a National Guard Technician lacks standing; thus, a Supreme Court ruling will deter future discrimination and retaliation complaints.

The dilemma is that whistle blower retaliation claims, incident to military service, lack state or federal remedy other than judicial review of the Secretary of the Army's ruling. Army correspondence governing retaliation and whistle blower policy is misleading and misrepresentative. A reasonable person will conclude that the TCU and the Department of the Army actions had a prejudicial effect on the service member's career and on the compensation for the tragedy.

Other intervening events are controlling. The U.S. Department of Veterans Affairs granted waiver of an education debt. It was taken out of my initial settlement package concerning decision AC 95-08841. The waiver states: "It would be against equity and good conscience to pursue collection of this debt which was not of your doing and over which you have no control". Secondly, a successful challenge, pursuant to the Freedom Of Information Act, revealed a second finding of whistle blower reprisal and official misconduct against the Texas National Guard. Documents were not disclosed until 15 April 1999 after I had lodged a formal discrimination complaint on the basis of religion and retaliation. It is shown that the Department of Army was prejudicial in terms of equity, accumulative damages, future employment and wages, loss of awards, restoration of personnel actions, admission, and omission to award damages.

Your disposition of discrimination and reprisal claims is important and germane to fairness whether the EEOC rules or not. This letter is notice. Enclosure 1, paragraph 62, applicant request all equitable relief that may be awarded by the ABCMR and liquidated, compensatory, and punitive damages. Consider totaling my active duty time May 1973 to June of 1993, increasing the rank, and conversion of civil service time to active time for retirement purposes.

Essentially, the National Guard Bureau reprisal was a continuation of the Department of the Army reprisal action. Each reprisal action had a domino effect on career progression and ended in involuntary termination, first as an Army Major on active duty, then as an Army Sergeant and GS-7 in the Texas National Guard. Equity is not provided in the applicant's settlement in terms of damages, future employment and wages,

loss of awards, credit for leave time, the disadvantage of paying lump sum federal taxes, in terms of interest, award of attorney fees and/or costs. In comparison, **Title 5, Part III, Subpart D, Chapter 55, Pay Administration, Subchapter IX, Back Pay 5596** states: due to unjustifiable personnel action, an applicant shall be paid interest **(2) (A)**; shall be restored leave(**B**) **(i)**, and such interest shall be compounded daily**(B) (iii)**. Since retaliation is a form of discrimination, damages are permissible, warranted, and applicable for each of the confirmed reprisal actions. The Army Board for Correcting Military records accepted the DoD military whistle blower investigation, and appropriately declared one of the efficiency reports and the Army discharge from active duty as unjustifiable actions. I pray for a similar verdict on the accountability concerning TCU misconduct.

Although the DoD has statutory authority to carry out and execute policy i.e. to order a "cease and desist" and to take such appropriate action as to award "compensatory damages" and hold personnel "accountable", enforcement is lax. The fraudulent conduct on the part of DOD agencies and affiliates bring the Department of the Army, Office of the Texas Governor, and the Administration Department of the Texas Adjutant General, and a private Texas University ROTC program in question. New knowledge became available in March 1999 and January 2000 to obtain a conviction. Based on these conditions and this evidence regarding the conspiracy, the District Court can affirm punitive damages and make the final settlement equitable and complete. Concealment of knowledge casts doubt on credibility and efficiency of the service.

In summary, it is a matter of public interest that a DoD affiliate, Texas Christian University, receives $ 6,000,000 **(6 million)** annually, yet escapes accountability for retaliation, reprisal, and violation of due process. As the record reflects, I reported violations of the UCMJ, Texas and Federal law. Evidence is not lacking and the DoD whistle blower Inspector General investigation states "Mr. Boswell's whistle blower actions are not in dispute". If it is disputed that DOD Senior Official (s) violated regulation and law concerning adultery, sexual harassment, sexual impropriety, misapplication of fiduciary property, racial discrimination, display of pornography, abuse of authority, violation of due process, then a follow-up DOD Whistle Blower investigation is requested. Rather than admission, denial, or dispute of issues, Department of Army, National Guard Bureau

and DoD affiliate's express sovereign immunity and rely on *Feres* . Army Inspector General, Major General Hale committed and was convicted of misconduct, adultery. It is reasonable to question and expect that Department of Defense officers and affiliates, in their official capacity, undermine investigative processes of similar situated criminal activity. A clear pattern is this: I allege supervisor misconduct. The supervisor retaliated. Respondents harbored and protected the accused from prosecution. This is nexus to several adverse personnel actions in 1986 (poor efficiency rating), 1987 (poor efficiency rating, **overturned**) , 1989 (unlawful discharge, **overturned**) , 1998 (request for adverse personnel action), and 1999 (a second involuntary termination). Department of Army and DOD affiliate, Texas Christian University must bear some responsibility as a Marine spokesman, Colonel Don Ezell so eloquently articulates to Members of the Board of Trustees, Texas Christian University in August of 1998 at Fort Worth Texas, via letter.

How do officials escape public scrutiny and liability? Reliance is on the defense of sovereign immunity. This defense consistently appears successful in State and Federal Court. Liability is a matter of discretion, discretion which is delegated from the Secretary of the Army to an Administrative Official. Concerning having a positive impact on reprisal 2 and 3, authorities, Governor George Bush of Texas, and his Adjutant General, General James intentionally ignored complaints and omitted to act. These authorities control the federal employees i.e. Department of Army chain of command and their subordinate investigative officials. When accountability is an issue, the controversy is lost and entangled in State vs Federal at which time the victim looses. Collectively, the State authorities give the appearance of intentional discrimination and cover up to gain or sustain political aspiration. So this case is comparable to that of the conviction of the State of Kentucky's former Adjutant General. Statutory authority has made similar inferences concerning motive in cases ranging from the most recent harassment controversy concerning the Army and General Smith to several former Army convictions: (Department of the Army, Major General Hale; Major General John Maher III; Command Sergeant Major Riley Miler). The record shows that retaliation is not new to the Adjutant General of Texas. A San Antonio jury found Texas AG, Major General Dennis liable for $ 50,000 for retaliation but the finding was reversed on appeal. The movie "The General's Daughter" was based on the incident involving General

Crampbell at West Point Academy. Regardless of motive, the misconduct has a negative impact and is not good for our children or our country. Service personnel challenge the systemic failures with out aid, and mostly to no avail. I am one of the lucky ones to have survived this long. There are shortfalls in enforcement policy, investigation and detection methodology, application of corrective action. Most of all there is a serious shortfall regarding deterrence and punishment of retaliation and reprisal.

So what is the damage? The obvious direct damage to my career was substandard performance appraisal, lack of end of tour award, notification of these events to a successive boss, and joint corroborating testimony at show cause hearing. Please also consider the indirect harm to our Nation and economy. An assessment must also take into account the insidious nature of repetitive accounts of reprisal over a long period of time. Several Generals have been charged and convicted of misconduct. The problem is greater than what the media has reflected: Systemically, not being able to confront corruption without penalty has a harmful effect.

It is undisputed that National Guard and Army recruits and ROTC cadets at Universities are impressionable. I responded to student concerns in compliance with military training, Texas and Federal Whistle Blower Law. University officials, in corroboration with an Army Lieutenant Colonel harmed one black cadet, many female cadets and four black cadre members. Consider the hostile environment where a senior official had sexual intercourse with a cadet who could have very well been your daughter or grand daughter. The University cheated cadets out of $ 14,000, a second degree felony offense. The money was not returned. The fraudulent actions and breach of fiduciary property was accomplished without cadet voice or consent. Cadet's feared reprisal and loss of commission because prior actions setting a precedent. Students witnessed previous unlawful breach of enrollment and discharge for those who complained. One victim vanished, disappeared. On the students behalf, I voiced the complaint to the University Authorities and the Inspector General. In violation of due process, I was immediately terminated and moved from Ft. Worth to Fort Hood. My family remained in Ft. Worth. The damage is irrevocable. The accused elevated college grades to appease those cadets at risk. The female and black cadet were terminated from the program without remedy or recourse. The DoD IG and ABCMR affirmed "due process was violated".

Even worse, while I awaited final disposition and results of the ABCMR and special selection board process, I witnessed corruption in the Texas National Guard concerning pornography and fraud regarding the military schooling program. Why was Texas rated last among 52 states? I identified officials who violated the law, retaliated, and again, hindered due process. I provided the DoD with a list of respondents and description of each action. Consider the loss and waste in government resources in the numerous investigations, inquiries, and requests for redress. Each avenue of appeal was submitted in compliance with Army IG, Commander Inquiry, and Article 138 procedures or regulatory standard. Whereas Army investigations found no wrongdoing and no reprisal, notably, two **external investigations** found reprisal. An active Air Force Colonel Inspector General recorded the second case of reprisal (DoD IG H94L56226017, 10 U.S.C. 1034 military whistle blower). A Navy Captain investigated the Texas Guard and substantiated the third account of reprisal. In the first **external** investigation, an Assistant Secretary of the Army characterized the reprisal as "arbitrary and contrary to principles normally applied". In spite of Secretary of the Army interest, reprisal continued. It is systemic. In the later investigation, the Navy Captain investigator recommended the Army Colonel be disciplined. Again, manipulation and coercion hindered due process. My case was prejudiced. The Texas Adjutant General and Army General officers covered up the reprisal finding. I provided notification and details of the cover up to Governor Bush. No action or intervention was forthcoming from him.

Why do service members - victims of retaliation - lose their battles with the Boards and in Court? We - All Americans lose when rights are compromised and deprived. Policy and policy enforcement are misrepresented. Military service personnel and civil service technician lack civil rights.

I earnestly pray that a DOD mechanism will be initiated and enforced, externally. I am grateful to certain DoD officials who kept me from being totally on my own. Clearly, Army officials have violated reprisal policy, not just once, but after notice, a second and third time. Improper agency actions and corroboration are of sufficient magnitude and force that they delude basic equity principles and fundamentals of fairness. Investigative tactics and deceptiveness have been identified and challenged. Evidence supports characterization

of the cliché "the fox guarding the hen house". The system, as is, does harm to service members and to the efficiency of the service.

What is the solution? How can we in good conscious encourage citizens to enlist when their rights are forfeited and unprotected? The accused has indirect means and blanket authority to cause irrevocable damage, to conceal and taint evidence, to coerce, influence and manipulate others within their spheres of control, to form a counter veiling force with government assets. One Army National Guard officer, my Brigade Commander, continued to back me. He suffered the consequence. He was removed from the system. A victim, only by extreme good luck, is able to overturn a career damaging personnel decision.

Two of the most basic tests for equity are "by preponderance of evidence" and "reasonableness". In the face of adversity, public scrutiny and reputation, the actions of the chain of command bias the most elementary of "Agency controlled" conclusions. Boards for Correcting Military Records and Special Selection Promotion Boards are ineffective to make a victim whole again. The accused causes unfavorable personnel action simply by omission, a provocative phone call or stroke of a pen. Omission to recommend an award or to comment favorably on promotion potential was devastating in an extremely competitive environment. DOD personnel who uphold the constitution should never be punished. Yet, they commonly are. In contrast , they should be compensated generously and rewarded for commitment, courage and sacrifice.

Applicant meets the requirements of the test "by preponderance of evidence". Examples include: (1) An Army Lieutenant Colonel admits to his respective role in the agency role and conspiracy action. (2) Army witnesses now attest to fear of chain of command reprisal. (3) The female victim of Army sexual misconduct voluntarily took a polygraph exam. (4) Cadets testify about loss of money. (5) Newspapers highlight military personnel engaging in pornography and solicitation of sex with a thirteen year boy. (6) III Armored Corps Inspector General (witness to the case) recommends promotion to Lieutenant Colonel. (7) One Army Lieutenant General and multiple Army General Officers recommend deletion of two performance appraisals and promotion to Lieutenant Colonel. (8) Case sparks Congressional and Secretary of the Army interest. (9) A Marine Colonel recommends TCU bear responsibility.

The test for reasonableness of actions concerns the opinions of each of the honorable justices of the United States Supreme Court. What would you have done? How should this be corrected? This case justifies complete relief. Please, let the verdict be precedence, an endorsement of high standard where other service members will benefit. Emphasize the importance of integrity. Produce a zero tolerance model for deterrence of retaliation in any form. As is, service members receive a clear message of discouragement for reporting protected disclosures. This perception must be challenged and changed where service members are rewarded for exercising decency and duty.

You and I and the public tax payer compensate, daily, for the problematic effect. How is it that by last count, an enlistment bonus was $ 6, 000. In reality, the totality and integrity of the Department of Army, DOD affiliates and the National Guard Bureau actions are significant factors to low morale, reduced recruitment, readiness, and retention. Adverse recruiting trends are blamed on the impact of strong economy but the factors I have listed are of far greater importance. It is time to usher a new error.

In the U.S. 9th Circuit Court of Appeals DOES I v ADVANCED TEXTILE 9916713 Argued and Submitted December 7, 1999--San Francisco, California concerning Labor and Employment/Unfair Labor Practices plaintiffs filed an action demonstrating that they had an objectively reasonable fear of extraordinarily severe retaliation. The employees represented citizens of the island of Saipan, the People's Republic of China (China), and citizens of Bangladesh. They filed their complaint under the pseudonyms "Jane Does I-XXIII," alleging that they feared retaliation and that they and their families would face physical and economic retaliation if their true identity was revealed. Several workers testified that they feared the Chinese government would arrest them or their family members if they breached the recruitment contract, or if they were unable to pay their debts under the recruitment contract. In an attempt to dissuade workers from complaining, managers interrogated workers about whether they spoke to lawyers or filed complaints about working conditions, warned them not to complain, and threatened them with various reprisals, including termination, blacklisting, and deportation. There was also testimony that employers made oblique threats of physical harm to employees who complained about working conditions. The workers filed suit as a FLSA collective action on behalf of approximately 25,000

similarly situated garment workers. They moved the district court to authorize notice to{PRIVATE } be sent to all potential workers under S 16(b) of FLSA, which authorizes an employee to bring an action on behalf of similarly situated employees, but requires that each employee opt in to the suit by filing a consent to sue with the district court.

As you compare these facts with the facts in Boswell vs Texas Christian University, you may be startled by the comparisons. You will question whether the actions of DoD agencies and Texas Christian University had a prejudicial effect on investigations, plaintiff's claims, and the public's interest in a case of widespread implications. TCU workers' provided evidence of threatened retaliation, a real danger of physical harm, fear of economic retaliation, and fear of reprisal. The evidence was sufficient for the District Court to **reject** a request for summary judgment. Fifth Circuit Court of Appeals dismissed the appeal "We lack jurisdiction". Thus this case has never been reviewed on the merits. The disputed important retaliation issue is not resolved. On 18 January 2000 plaintiff went back to the District Court with new evidence, and motioned to reopen the case. The Supreme Court may preserve based on equity and merits in judicial proceedings in special circumstances when the party's need for equity outweighs prejudice to the opposing party. The public's interest in tantamount.

The district court does not lacked jurisdiction to protect plaintiff from retaliation by nonparties to the suit. The court was shown evidence of threatened retaliation based on sworn affidavits. The court may not successfully argue that evidence was in large part on hearsay and innuendo." A reasonable person would have to take the death threat seriously and believe that it did resemble and demonstrate a "real danger of physical harm". Economic retaliation is sufficient to support reason for fear of retaliation. While the court may decide that other protections are available to plaintiff, including the United States marshal service, FLSA's prohibition on employer retaliation against employees who file labor complaints is 29 U.S.C. S 215(a)(3). Military service members rely on the Department of the Army Inspector General and Criminal Investigation Command. Plaintiff reported these developments to the appropriate authority and although they failed to act, a military whistle blower investigation was conducted and it concluded reprisal. In the 9th Circuit case, the Chinese employees feared arrest. Several workers testified that they fear the Chinese government will arrest them or their family

members if they breach the recruitment contract, or if they are unable to pay the debts acquired under the recruitment contract. Similarly, Boswell feared retaliation and arrest but to no avail. Boswell and twelve year old daughter were falsely arrested, search (and damaging evidence against Defendant was confiscated) and escorted to the hospital where Boswell was required to report for admission for psychiatric evaluation. The attorney fees to visit the appropriate leaders in Washington D.C. totaled several thousand dollars, and in spite of deprivation of a money entitlement, plaintiff filed suit, appealed the District Court to the fifth circuit, and provides petition via this writ of certiorari, **Pro Se.** Meanwhile, the opposition continues to provide threats the last threat being termination from federal service currently in EEOC channels. Does Plaintiffs also presented evidence that China's state secrets law has been used to prosecute and imprison workers for complaining about their working conditions abroad. Boswell presented evidence that University officials violated title 7 32.45 misapplication of fiduciary property, a second degree felony offense.

On a positive note, in this great country, there is always hope that we can learn from mistakes and recoup losses. Starting at the first level of objectivity, the Army Discharge Review Board in 1994, by a strong will of the majority, a vote, 4 to 1, took positive action. The endorsements provided by several distinguished citizens, General Officer equivalents and the former Chairman of the Senate Committee on Armed Services in 1996 and partial corrective action by the ABCMR in 1997 carry more significant weight then the weak posture of the accused. Given the opportunity for judicial review, the evidence and credibility will be weighed in favor of reasonable diligence, good faith and conscience. My federal service was respectable and honorable. My actions represented a duty and responsibility.

This is an undisputed whistle blower case. In equity and fairness, please do your very best and make a difference. I believe your assessment will conclude two opposing forces. One is characterized as selfless service and servant-hood acceptable before GOD, Country, Family and the public eye. The other is adamantly different, in opposition, and somewhat anonymous. This force represents destruction, intentional harm to the Armed Services, the military, the civil service employee, the efficiency of the service, and harm to the citizens of Texas. If left uncorrected, the applicant will have no recourse. All avenues of relief are foreclosed upon the

application of the Feres doctrine. Finally, your decision will affect the fairness, integrity, and public reputation of administrative and judicial proceedings.

Appendix G

Statutory Provisions Invoked

TORT ACTION

Plaintiff seeks damages from the following TORT actions and references the appropriate section in accordance with Prosser and Keeton on Tort liability e.g. sections:

11 False Imprisonment.

12 Infliction of Mental Distress.

36 Violation of Statute.

91 Interference With Use and Enjoyment of Private Property.

92 Breech of Contract.

102 Contributory Negligence, Misuse , and other Intervening Misconduct.

105 Misrepresentation.

111 Defamation.

112 Libel and Slander.

117 Right of Privacy.

119 Malicious Prosecution.

121 Abuse of Process.

124 Interference with Family Relations.

125 Injuries to Members of the Family.

130 Inference with Perspective Advantage

And for Undermining Public Policy, common law of expressed individual contracts, and unlawful retaliation

Section 11 Tort of False Imprisonment. The right is one of freedom. Plaintiff and plaintiff's twelve year old daughter were forced into a military sedan and escorted to an Armed Service Hospital. (daughters statement exhibit 7). Plaintiff is entitled to damages for mental suffering, humiliation and the like Boies v. Raynor, 1961,

89 Ariz, 257,361 P. 2d.1. Because of the malevolent intentions which usually accompany false imprisonment, or at least the reckless disregard of the plaintiff's interest, punitive damages, are awarded. Atkinson v. Dixie Greyhound Lines, 5th Cir. 1944, 143 F.2d 477. Any defense on the defendant's behalf will be countered by the fact that plaintiff was declared a whistle blower. Plaintiff reported that Dean McCracken was in violation of Texas Statute 32.45 misapplication of fiduciary property, and due to the amount misapplied being over $ 10,000, this was a second degree felony offense (plaintiff's exhibit 16). Defendant's intent was to discredit plaintiff and to confine plaintiff for psychiatric evaluation.

Section 12 Infliction of Mental Distress and intentional infliction of emotional harm. Plaintiff references the corruption in the Texas National Guard concerning drug enforcement illegal activities in Cole vrs Adjutant General of Texas (case 493,769 1990) and Newth vrs Adjutant General of Texas (case 03-93-00516-CV 1992). Both officers were compensated through agency promotion procedures. Plaintiff was not. Captain Newth retired a Lieutenant Colonel. Lieutenant Colonel Cole is now a full Colonel. From January 1987 until December 1998, Plaintiff has exhausted administrative remedies in good faith. Plaintiff's numerous request for discovery, investigation, adjudication ended on May 21, 1997 with a conclusion of reprisal from the Army Board for Correcting Military Records. Plaintiff petitioned to the Army Discharge Review Board in March 1991, received the results of the Secretarial authority appeal of the Army Discharge Review Board on October 1994, received results of the Department of Defense Inspector General Report in July 1995. Administrative resolution was slowed by Department of Army and TCU failure to respond and fulfill freedom of information request, investigation delays, and most of all time lags awaiting three Army Boards: the show cause board of action ending March 1989, the Army Discharge Review Board action ending December 1993, and the Army Board for Correcting Military Records action ending May 1997, and finally the appeal to the Secretary of Defense of the Army's interim final decision ending November 1997. These subsequent activities caused by TCU's negligence and my struggle for compensation took its toll on Plaintiff and family members. The stress caused the break up of the marriage, the ex wife commitment to charter hospital in 1992 and 1999, and the damaged relationship between plaintiff and his two daughters. Questioning the plaintiff's sanity and honesty caused an unnecessary

mental distress. TCU caused plaintiff to be ousted "black balled" from the Army's fraternity, the officer's corps. Plaintiff had lost his profession, which no matter how hard one tries, is unrecoverable in the Army environment, even if one was to serve six years in the enlisted grade as sergeant, under conditions of humility. The negligent and reckless handling of plaintiff's case had a transferred effect of horrible treatment from TCU to United States defendants and then to army officials in general. Because of TCU failure to acknowledge error, it has taken an enormous amount of time, some twelve years, to correct TCU's negligence. During the civil trial, an expert witness is expected to testify. Plaintiff was threatened with a TCU attorney threat (exhibit 13) and an official death threat (exhibit 8). Plaintiff endured public humiliation when students were assembled and provided with accusations of dishonesty and a theory that defendant's did nothing wrong. Both daughters provide sworn affidavits to the extent of injury.

Section 36 Violation of Statute. Breach of the statute is evidence of negligence. Negligence is the breach of a legal duty. TCU's position is that TCU had no legal duty. It is immaterial whether the duty is imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. The merits of this case are governed by traditional constitution law in a peace time environment whereby the Army is trying to demonstrate excellence to attract new soldiers and sustain integrity so the current ones will not leave. **Section 1034 of Title 10, United States Code states**: *Prohibition of retaliatory personnel actions. No person may take (or threaten to take) an unfavorable personnel action, as reprisal against a member of the armed forces for making or preparing a communication to a Member of Congress or an Inspector General.* Reprisal to plaintiff came after plaintiff communicated with Congressman or Inspector General. The government substantiated that plaintiff was the victim of whistle blower activity. The government states that plaintiff is not entitled to protection from a statute that did not exist at the time the whistleblowing occurred. Precisely, this is why the state whistle blower act is an applicable standard of care. Plaintiff notes by judicial decision, it does wave sovereign immunity. TCU admits that plaintiff provided an audit of $ 14,000 of cadet money that plaintiff believed was in violation of state law 32.45 misapplication of fiduciary property. TCU admits accepting the $ 2, 365 check. Larceny is the taking and asportation of the

personal property of another by trespass and with intent to permanently deprive the person of his interest in the property. It was inappropriate and in bad faith that University and the Army officials spent cadet money without consent. TCU and the Army had a budget e. g. for travel funds. Any inquiry into felonies and crimes involving dishonesty is proper for impeachment purposes: A felony conviction can be proved by extrinsic evidence. Malice aforethought can also be implied from committing a felony. Neither Army nor TCU officials communicated a withdrawal from the conspiracy and withdrawal to stop taking the money until plaintiff confronted them. As result of this protective disclosure, Texas Christian University, through its agents and employees performing in official capacity, took unfavorable actions as reprisal, retaliated by requesting that Plaintiff's assignment be discontinued, denied due process and Constitutional rights afforded by the I, IV, V, and VI Amendments. TCU defendant is deemed to have requisite knowledge. Dean McCracken deliberately avoided discovering of the facts when he was capable of doing so. Malice aforethought is established when one of the coconspirators provided his intent to kill. It showed a reckless indifference to an unjustifiable high risk to human life. Before a decision is made to terminate an employee, an employee is entitled to an opportunity to test the strength of the evidence by confronting and cross-examining adverse witnesses and by presenting witnesses on their own behalf. The Dean intended to the object of conspiracy to its conclusion. The university and army denied plaintiff this opportunity. TCU discloses that the university did not need legal justification or an excuse. These actions violate the Constitution of the United States, Title 10 U.S.C. 1034, United States and Texas Whistle Blower Acts, and Title 38 U.S.C. As result of the reporting the defendants violation of federal and state statutes, Plaintiff lost a regular army officer commission and was discharged from the Armed Services. Statutes require all employees be treated the same for all employment-related purposes including receipt of benefits under the fringe benefit programs. Plaintiff's resistance to comply with the employer's implied threat to ignore the statutes resulted in retaliation and loss of assignment, fringe benefits, and a promising career. The public has an interest when students and recruits best interest and safety is in question. Texas Christian University continues to profit from government dollars primarily in the form of tuition, financial aid and grants. Texas Christian University continues to receive Texas State education accreditation and oversight. When a member of the

uniformed services is punished for performing an official duty, duty to defend and to protect citizen constitutional rights, federal protection and federal and state jurisdiction must apply. Plaintiff requests this honorable court waive all TCU claims. Plaintiff believed that a female cadet was violated when a Texas Christian University faculty member had sex with her, according to her statement, testimony, a polygraph, her diary, and a University evaluation report. TCU admits plaintiff reported a sexual harassment complaint. Her statement states without her consent: According to the polygraph, the victim's statement is truthful. She states **No, No, No in reference** to the alleged sexual assault. Plaintiff will not attempt to prove sexual misconduct; but will show that Section 1034 of Title 10 sec 531 prohibits retaliatory actions against members of the Armed Forces making allegations of sexual harassment or unlawful discrimination. As with a federal judge when protecting the rights of citizens , a military officer carries an awesome responsibility protecting the rights of new recruits, new cadets and incoming soldiers from abuse. TCU directs the plaintiff's discontinuation from ROTC duty before even talking to the student. An officer of the Armed Services can not condone superior - subordinate sex. Even if the sexual misconduct was not true, plaintiff should have not been fired. Plaintiff is entitled to actual and exemplary damages. Plaintiff feels the Texas Whistle Blower statute is a fair and accurate test which should be adopted and applied to this case out of deference and respect for the legislature. The class of persons to be protected may of course be a very broad one, extending to all those likely to be injured by the violation. Although plaintiff recognizes that he was not a state employee, by association and performing state regulated duties and enforcing state statutes, the definition may be broaden to protect plaintiff in accordance with the provisions of the Texas Whistle Blower statute intended for this purpose. Plaintiff notes that remedy in plaintiff's favor will not cost the state any money.

Section 91 Interference With Use and Enjoyment of Private Property and Section 92 Breech of Contract. Plaintiff was considered a new faculty member and was required to attend Texas Christian University orientation. Under the terms of being employed at TCU, Plaintiff was briefed and was provided **University literature** concerning faculty and student grievance procedures. During this orientation, Plaintiff was advised that *employees will have the opportunity to bring grievances to the attention of higher levels of*

administration without fear of reprisal . Plaintiff perceived this an appropriate and high standard and as a contractual promissory commitment. (Wooley v. Hoffman - La Roche, Inc. (N.J. 1985). TCU failed to meet their promissory and contractual obligations. TCU denies that this promise was made. The failed contract resulted in the unjust enrichment of TCU. Plaintiff's performance contributed to an annual federal contribution for $ 6, 000,000. Plaintiff recruited and assisted sustaining quality into the program. When two students (Becker {TCU show girl}and Douglas) reported written allegations of fraud (exhibit 16) the **promissory estoppel exception to the Statute of Frauds** warranted a TCU explanation. Plaintiff's effort for clarification was in good faith but ended in plaintiff's termination.

Section 102 Contributory Negligence, Misuse , and other Intervening Misconduct and section 105 Misrepresentation. Due to the Texas Christian University request for plaintiff's removal , Army officials issued Plaintiff a relief officer evaluation report. The Department of Defense Inspector General provided a comparison of all Plaintiff efficiency reports and noted during Plaintiff's fifteen year, ten month tenure, the efficiency report from Texas Christian University is the only of twenty-nine reports that recommended do not promote. (exhibit 1) Plaintiff, at own expense, met with the ROTC Cadet Commanding General in Oklahoma. After this General evaluates Dean McCracken's statement, she read plaintiff his rights. Plaintiff then was silenced and restricted to a conference room for an unreasonable period and was prohibited from discussing the allegations. Army Officials honored Dean McCracken's request: Two weeks after the Plaintiff reported the violations of the statutes and the danger to health and safety of the University students, Plaintiff was provided a written order reassigning Plaintiff to Ft Hood Texas. This assignment was one hundred and eighty miles from Plaintiff's family. As result of TCU's negligence, Plaintiff's relation with spouse and daughters suffered.

Section 111 Defamation, Section 112 Libel and Slander, Section 117 Right of Privacy. After Texas Christian University removed Plaintiff, an Army Investigator and Texas Christian University Professor of Military Science assembled Plaintiff's students (ROTC cadets in the junior class) in the Texas Christian University class room . Students were briefed on the Texas Christian University and Army version of Plaintiff's dismissal. One student witnessing the briefing provided the Plaintiff a written assessment of the occurrence. In

an extract to the Department of Army Inspector General report, it reveals the Texas Christian University's Professor of Military Science was reprimanded concerning this violation of privacy laws. An extract of this same report acknowledges that ten of the semester grades administered by the plaintiff to his students were changed (elevated) after Plaintiff's termination (exhibit 14). Texas Christian University's admits to the grade change and admits that Plaintiff's replacement for teaching the Plaintiff's classes was the Sergeant Major, who was the accused the plaintiff reported for the sexual misconduct (exhibit 15). Under Gertz v. Robert Welch, Inc., the litigant cannot be held liable for defamatory publication on a matter of public concern unless the litigant was at least negligent in ascertaining the truth or falsity of the defamatory matter. Using this same ruling the converse should apply. If TCU's conduct is determined negligible, TCU should be held liable for the defamatory publication (exhibit 11) signed on Texas Christian University stationary. Dean McCracken breached his duty for ascertaining the truth with regard to plaintiff's allegations concerning the violation of the constitution and state and federal statutes.

Section 119 Malicious Prosecution and section 121 Abuse of Process. The Reserve Officer Training Corps Program at Texas Christian University was under the authority and line of communication and administrative oversight of Dean Michael McCracken. Although the Army was primarily responsible for wages, Texas Christian University controlled aspects of compensation such as the fringe benefit of education and expenditures of the cadet fund. Texas Christian University retained the authority for assignments, privileges, and request for discontinuance of assignment . Plaintiff's request for removal was directed by Texas Christian University, specifically by Dean McCracken by TCU memorandum (exhibit 11) and executed by Department of the Army, Colonel James Bendele (exhibit 12). Plaintiff asserts wrongful termination. It was willful. Dean McCracken through the termination process showed a reckless disregard for the matter of whether conduct was prohibited by statutes. He was required to afford due process. Instead he led a CYA process by required an investigating of the messenger. This was a first step to a criminal process in accordance with Army Regulation 15-6. Plaintiff has a copy of the investigation and will cite numerous examples of witness tampering and obstruction to justice concerning this process. The investigation was fabricated to try to show that Plaintiff was negligent. The

Sergeant Major coached the government witnesses on what to say. Plaintiff was not allowed key witnesses as the victim of the sexual assault and key minority victims of discrimination. The process was a canned scenario. The Sergeant Major continued to teach even though Texas Christian University and Army officials had significant evidence provided by the victims, which incriminated the Sergeant Major as an alleged adulteress and sex offender. In spite of a biased cover-up investigation considered by Army personnel as illegal and in violation of AR 15-6, the removal was not over turned. The TCU controlled process was tainted with perjury, false statements, and deception. It is comforting that the Inspector General report states that in the opinion of the investigators an act of sexual intercourse occurred . . . and that management of the fund was not conducted with good faith. LTC Stacy and Dean McCracken were illegally motivated to discharge plaintiff. As condition to employment, all remaining army military officers and non commission officers continued to enjoy fringe benefits such as free tuition for family members to University education programs. It was unreasonable to expect these officers and enlisted personnel to exercise similar courage as plaintiff and risk their careers, family stability, and education opportunity. Therefore, they participated in a cover - up to give the appearance that the plaintiff's termination would be construed as just and legal. There motive was to discredit plaintiff's report of a potential felony of the second degree in violation of Texas law 32,45, title 7 offenses against property, neglects to the prejudice of good order and discipline, and failures to obey regulations. Nine of the Plaintiff's allegations were substantiated. The Sergeant Major and Professor of Military Science alleged four accounts of poor duty performance, and plaintiff was investigated for substandard performance of duty under an Army Regulation procedure AR 15-6. In this process, the investigation was hurriedly closed without Plaintiff input or cross examination. The retaliation practice motivated the Army cadre, officers and enlisted to make false statements, establish untruthful alibis, cover up for the wrongdoers and maliciously conspire against Plaintiff. The cadre were ordered to perform malicious illegal acts such as false imprisonment, and unlawful search and seizure of property. The investigator elected not to interview the students which had complained about fraud or the student which alleged she had sexual intercourse with the Sergeant Major without her consent. Plaintiff challenged the integrity of Inspector General and AR 15-6 investigations. Both senior officer investigators were compelled to

protect the General Officers of ROTC Cadet Command and the image at Texas Christian University, at all costs. Dean McCracken controlled the process, held the direction and oversight responsibility and could have prevented these actions from occurring. Plaintiff requested via letter to Major General Dennis of the Texas National Guard who belonged to a state agency that he intervene at Texas Christian University. Plaintiff's co-worker, LTC Bright was a Texas National Guard field grade officer who had knowledge of wrongdoing. This officer promised plaintiff he would tell the truth concerning plaintiff's allegations, but when the time came to reveal findings, he had a change of heart and sided with Texas Christian University and the ROTC chain of command. In March of 1999 he confessed. A Army Colonel from the office of the Chief of Staff of the Army testified on behalf of Plaintiff. The Department of Defense report references an Army Commander's Inquiry indicating the Plaintiff's **due process was violated** (exhibit 1, page 2, last para), and the lack of objectivity and fairness concerning the officer efficiency report which resulted from the Plaintiff's dismissal from the University. The President of the United States in his Presidential Address to the union January 23 1998, stated discrimination against any American is Un-American. And during the January 1999 Presidential address, the largest of the standing ovations was in honor of the black women who refused to give up her seat on the bus some years ago. Plaintiff was required to be the subject of an Army AR 15-6 investigation without evidence and probable cause. This is a first step to a criminal proceeding. The proceeding violated plaintiff's due process since it was concluded without plaintiff having opportunity for redress and to present witnesses in plaintiff's behalf. Defendant's purpose was malice and to discredit the witness for reporting the violation of felonious crime. Damages have been permitted in substantial sums on the theory that there is a serious harm in the violation of reputation of a plaintiff's right. Damages may be awarded for the loss to reputation, credit or standing, or for mental suffering and humiliation. Haswell v. Liberty mutual Insurance Company ., Mo 1977,557 S.W. .2d. 895. Because plaintiff's case is one where plaintiff will show ill will, it is generally agreed that the jury may award punitive damages. Chavez v. Sears Roebuck and Co. 10th Cir, 1975. , 525, F.2d 827. Plaintiff pleas that the court award damages designated as "special" for discomfort, deprivation of the society of family, injury to health, recovery expenses in establishing innocence, recovery from financial loss, prospective employment, and

loss of professional contacts. Dean McCracken had the authority and duty to intervene. His action was one of inaction, willfully conducted, to avoid being suspect to felonious offenses.

Defendants failure to accept responsibility and neglect has hindered the entire process concerning correction of records, and decision for promotion to the grade of Lieutenant Colonel for reasons such as that statute of limitations would expire. The court is asked to question the connection between defendants and Todd Weiler. Plaintiff notes that TCU alumni Todd Weiler when this suit was filed was the equivalent of a General officer at the Pentagon. He was a TCU cadet at the time of Plaintiff's removal from TCU. He testified against plaintiff during the investigation at TCU, received a substantial amount of money from the cadet fund, inappropriately resided with the Sergeant Major who was the accused of the sexual assault. He was the Sergeant Major's alibi. After the investigation he was requested to move from the Sergeant Major's residence. He was one of several government witnesses who first met with Sergeant Major before meeting with the Army investigator. The court is asked to question the integrity of the Army's Inspector General Investigations during the tenure of Major General Hale. Major General Hale reportedly played a significant role in the Inspector General's actions during the time plaintiff alleges Inspector General cover-up. Major General Hale in January of 1999 is accused of 17 specifications of obstruction to justice, making false statements, and conduct unbecoming of an officer. All 17 specifications stem from alleged sexual misconduct. He was convicted. The Hale's case follows on the heels of the Army's last high profile Article 32 proceeding, the 1997 case against the former Sergeant Major of the Army.

Section 124 Interference with Family Relations and section 125 Injuries to Members of the Family. Due to Dean McCracken's request for plaintiff's removal, two weeks after the Plaintiff reported the danger to health and safety of the University students, Plaintiff was provided a written order reassigning Plaintiff to Ft Hood Texas. From Ft. Hood to Ft. Worth one has to drive through Killeen, Temple, Waco and to Ft. Worth. To visit my daughter is an extra forty-five minutes to Louisville. Without plaintiff's knowledge, one of the conspirators began courting plaintiff's wife as revealed in the deposition during the process of divorce. Plaintiff's relation with spouse and daughters suffered. The family could not bear the mental and emotional stress. Daughter's set back and repeat of the first grade could have been avoided. The causal effect was the hardship caused due to

dad's unexpected reassignment four driving hours away. The other daughter's lack of standing in society can be attributed to a prejudice against the coconspirators representing Texas Christian University and the Army and mental anguish due to being a victim as she is trying to understand why dad and her are being escorted. She describes:

> **"I visited dad's ROTC detachment and the campus of Texas Christian University. It was about noon time when I returned from the campus library . . . when I looked at my dad I saw he was sad and I started crying. Two men in uniform escorted us into an car which was lime green and off white. My dad and I sat in the back seat. I was on the right. We then went to the hospital and I sat in the car with one of the men in uniform. Dad went in with the other man to the hospital. I am sure the Sergeant Major had sexual intercourse with the cadet. I often wondered about the emotional difficulty this female student was having. In spite of losing what was most important to him, he did what I believe was right, and was seeking fairness and justice for this student. Before dad's discharge I lived stress free. . . had free medical benefits, won most attractive, was a varsity cheerleader. Due to dad's discharge I had to move away. I had to struggle to keep the life I once had."** (exhibit 7).

Plaintiff received a confirmed death threat by an Army Colonel (under oath witness statement exhibit 8), Plaintiff asserts Dean McCracken and Lieutenant Colonel Stacy, military officers from the office of the Inspector General, to include General officers, conspired and intentionally wronged plaintiff and family members. Because of the damaging effect this wrong doing has on Texas Christian University and the Armed Services's reputation, a strong effort and force prevails to deter administrative and judicial remedy. TCU has not engaged in any actions to correct the wrongs.

Sec 130 Interference with Perspective Advantage. In Longo v. Reilly , 1955, 35 N.J.Super,405,114 A.2d 302. Fraudulent conduct resulted in Plaintiff's defeat in election of office. In Plaintiff's case fraudulent actions were disguised to cover up criminal and immoral action. The conduct caused the defeat of plaintiff and is treated as the wrongful interference with a property right. Conduct tortious in itself, such as fraud or defamation or conduct depriving plaintiff from the capacity to act, as where there is duress or undue influence is an issue in

this case. In Woolridge Manufacturing Co. v. United States, 1956, 98 U.S. App.D.C. 286,235F.2d 513, centiorari denied 351 U.S. 989, 76 S. Ct 1054, 100 L.Ed. 1502 chief of engineers negligently delayed a report, causing plaintiff to lose contract. This Plaintiff was ordered to silence and provided a written order which prohibited plaintiff from acquiring witnesses in his behalf. Furthermore, TCU defendants failed to respond to freedom of information request. In plaintiff's case Dean McCracken had foreseeability, closeness of connection to others accused of violating the statutes, and moral obligation to correctly assess blame. Dean McCracken's "appropriate" decision making could have altered the outcome and prevent injury to plaintiff and family. Plaintiff's proof of the intentional interference and resulting damage establishes a prima facie tort casting upon the defendant the burden of avoiding liability. Plaintiff was a student and member of the faculty. Even in the absence of a perspective right, defendants can not bar Vietnam and Vietnam veterans from TCU campus. (CR exhibit 11). The conduct of each defendant , however reasonable it would be in itself, becomes unreasonable in view of what the others are doing. As long as plaintiff's conduct was honorable as it was, plaintiff is entitled to a reasonable use and enjoyment of the TCU property to the same extent of other faculty and students and to the same degree that other veterans of the Armed Services enjoy the University. Concerning TORTS, successive tortfeasors (i.e., where TCU first injured the plaintiff and then the United States Government injures plaintiff) are generally held liable for the full amount of plaintiff's damages where they combine to produce a single indivisible harm. In any event, the modern and best approach is to grant the equitable remedy of injunctive relief when the gravity of the harm from the activity exceeds the utility of the conduct. TCU and United States Defendants were engaged in concert in a negligent course of action; thus, the basis for imposing joint and several liability. Texas Christian University volitional conduct resulted in a serious invasion of plaintiff's interest. Plaintiff is entitled to at least nominal, and dependent on the nature of the defendant's conduct, plaintiff may be entitled to punitive damages. What happened to Plaintiff and daughter in a series of actions, besides the false imprisonment, entitles plaintiff to recover damages for the humiliation suffered. Dean McCracken's negligence and actions led to the discharge of plaintiff from employment at the University and subsequently discharge from the United States, was foreseeable. When Plaintiff reported to the Dean the violations as admitted to in the

discovery, Dean McCracken acted unreasonably. There remains a nexus to a most disturbing correlation between the discharge of plaintiff and the cover up for plaintiff reporting felonious offenses. Dean McCracken and the United States coconspirators created a misrepresentation and was responsible for contributory negligence, misuse, and other intervening misconduct. These malicious acts were the approximate cause for injurious harm to plaintiff. Under the transfer of intent doctrine, Dean McCracken willfully directed that Plaintiff be removed from Texas Christian University. In the case of DeZarn's and in plaintiff's case the Inspecting General Report on the investigation was inconclusive with a few exceptions. One of the exceptions in Plaintiff's case was a finding that the semester grade for ten of the students taught by plaintiff were changed (elevated without plaintiff consent). The other was that plaintiff's right in violation of privacy law was violated. Texas Christian University students were assembled and provided with slanderous and false information. Plaintiff alleges this was the conspirators deceptive tactic to cover up for the felonious offenses plaintiff reported. With DeZarn in a 14 page unanimous opinion, the court outlined a scenario in which the conspirators knew what was in question. United States District Judge Gerald Rosen wrote that "investigation and question of DeZarn did not occur in a vacuum of information". Similarly, Plaintiff's case is piece meal where bits of information has surfaced and established credibility and truth. Plaintiff should not be penalized because this case was buried by powerful bureaucrats. It took an unbiased official (outside Army channels) report of a female Air Force Inspector General Lieutenant Colonel in 1995 to substantiate reprisal that took place at TCU in 1986. Senator Sam Nunn stepped in and broke the barrier.

Undermining Public Policy. The common law of expressed contracts and unlawful retaliation is shown beyond reasonable doubt. TCU benefits, and continues to benefit, from undermining public policy at the expense of service members and Americans.

Appendix H

Constitutional provisions

Encroachment of Constitutional Duties

Violation of the First Amendment. The First Amendment right for freedom of speech and the right to petition for redress was abridged. Termination violates free speech rights to be entitled to a hearing under procedural due process principles Givhan v. Western Line Consolidated School District (1979). Department of Defense Inspector General report exhibit 1, page 1, para 2, states the finding of reprisal was not adequately documented or communicated when deciding the Plaintiff's administrative appeal to the Defendant's discharge from the Armed Services. When plaintiff learned of the Army's decision to deny further redress, plaintiff was employed with the Texas National Guard. Plaintiff attended a meeting in Dallas with other members of an organization called **Wounded Eagles**. Plaintiff briefly spoke with a National television reporter. The Army provided Plaintiff with a written notification of verbal reprimand (exhibit 9). This was a government infringement. The conspiracy continued. The meeting with the reporter made plaintiff's supervisor nervous because plaintiff felt he feared that plaintiff would expose his Army National Guard supervisor for showing video pornography in the work place, for obstructing justice, and for cover up of his and former colleagues's violations of the standard for conduct and violations of the public trust at TCU. Plaintiff's request for the Inspector General to investigate and confiscate the video for future litigation was denied. Army officer violations were prohibited by a person subject to **chapter 47 of title 10, United States Code (the Uniform Code of Military Justice),** punishable as violation of **section 892 of such title (article 92 of the Uniform Code of Military Justice)**. The Army's leadership's actions hindered plaintiff from reverting to Plaintiff's former position of Major. In stead Plaintiff performed as a Sergeant for six years without promotion. Army leadership again failed to act on an investigation, ignored the violations and engaged in harmful personnel actions. Members of the uniformed services must be protected as every other American from an encroachment of constitutional rights. The purpose and thrust of whistle blower protection is to make public employees, even those with the power to silence

informers by firing them from speaking out, more obedient to law. Absent any whistle blower act, employees, regardless, of status, are protected from violations of the constitution. Plaintiff and family continues to suffer unless the court grants plaintiff the right to a trial and by a jury.

Plaintiff's Fourth and Fifth Amendment rights. During the process of employment termination, the Plaintiff's Fourth and Fifth Amendment rights against unreasonable searches and seizures was not protected. Obstruction of Justice prevailed when Plaintiff's brief case was searched and the contents supporting Plaintiff's suspicions of cover-up of wrong doings were confiscated. Plaintiff was provided official notice of termination. Plaintiff and twelve year old daughter were escorted to the local air base hospital where plaintiff was ordered to psychiatric evaluation. Afterwards, Plaintiff received a confirmed death threat.

Fifth Amendment right of life and liberty without due process. As of this suit, Texas Christian University nor Army officials have lifted the bar. Today plaintiff can not visit the campus. This has deprived Plaintiff of a fundamental liberty. Plaintiff voiced an opposition and provided three letters to Texas Christian University and one to Texas Christian University Chairman and member of the Board of Trustees requesting formal redress. The Chairman and member of the Board of Trustees refused certified mail. Each of these letters requested compliance of procedural grievance and redress procedures. Texas Christian University (TCU) General Counsel notification to immediately cease and desist all further communications with TCU is at exhibit 12, court record. TCU admits that Plaintiff was denied grievance and redress procedures. Plaintiff is protected under the due process clause of the fifth amendment. The facts also give rise to a claim under the equal protection clause.

Sixth and Seventh Amendments. Courts recognize the right to a speedy trial and jury in a civil action. Plaintiff believes that the Secretary Authority actions regarding delay of board actions and disapproval of the (jury) the five member board's finding regarding relief in favor of plaintiff was not in compliance with the spirit of these amendments. Plaintiff was deprived of his **VI Amendment** right for obtaining witnesses in his favor and to have assistance of counsel during an investigation which plaintiff deems was a cover - up action.

The thirteenth Amendment. The supreme court has upheld statutes regarding to private contracts in Runyan v McCrary 1967. The supreme court has relied more on the thirteenth amendment than on the fourteenth

amendment when it comes to issues like private discrimination because of the direct relevancy. Plaintiff found that minority race members were discriminated against in private contracts, reacted, and suffered the consequences. Congress passed a bill. "It shall be unlawful to discriminate against minority race members in the making and enforcement of any public or private contract, of every kind whatsoever. Any person whose rights under this statute are violated may bring a cause of action against that party in district court in which he resides and , seeking treble damages **(Gilbert Multistate Exam Workshop 1997,p 647)** . Like in Runyan, Johnson v Railway Express Agency Inc , the thirteenth amendment was held to be violated by private persons conspiring to deprive blacks of educational and employment opportunities based on race. **(Gilbert Multistate Exam Workshop 1997,p 232) .**

The Fourteen Amendment. Even though TCU is privately owned, acceptance of federal assisted funds protects against infringement of rights. State actions can be found in the actions of seemingly private organizations that have significant state involvement in their activities. The state can not facilitate, encourage, or authorize acts of discrimination by any citizens. Plaintiff must be afforded equal protection to the law. Plaintiff was not. There is no government compelling or overriding purpose that allows the private interest of the University or Army to overshadow the protection against unreasonable discrimination. There is a compelling need to apply the Texas Whistle Blower statute. The federal court may grant a declaratory judgment that the laws governing TCU actions is unconstitutional, and in this case of actual controversy, issue a final judgment declaring the rights and liberties of plaintiff. Plaintiff argues a constitutional challenge, proven harassment, discrimination and obstruction of justice in bad faith, and shows injury of fact. TCU can't receive vital government benefits and services without uniformly applying fundamental rights. If this were to be so than we would need to advertise and mark the campus with danger signs just as those that mark a minefield. Injury to plaintiff appears to have violated the **Establishment and Free Exercise clauses**. Plaintiff should be able to exercise Christian principles, the same principles that are published in the University's handbook, without reprisal. Officials at TCU had a discriminatory purpose for applying the treatment to plaintiff. Plaintiff's request for discovery documents is a reasonable means of disclosing the state's interest of disclosing possible

conflicts of interest that has compromised the University and Army ROTC program. All Military officers take a loyalty oath to defend the constitution.

Deprivation without Due Process. Breaching the oral contact between TCU and plaintiff deprived plaintiff of a property right created as a result of the voluntary promise made by TCU administrators, and such deprivation may not be accomplished without due process, meaning a notice and an opportunity to respond. **(Gilbert Multistate Exam Workshop 1997, p 237)**

Angela Moris and Stacy Handley vs. Regents of the University of Colorado No. 96-1555. "Plaintiffs were enrolled in the University of Colorado's Reserve Officer Training Corps (ROTC) program. They reported harassment to university representatives. The university did not adequately respond to the allegations of harassment". Appellant was also a university student and ROTC instructor and was denied grievance and university benefits. Plaintiff was in opposition to prohibited discrimination and was participation in the statutory complaint process. Students reported racial discrimination, sexual harassment and sexual impropriety, and mistrust and fraud concerning fiduciary responsibility. Plaintiff took each complaint and forwarded the complaint to the Department of Army Inspector General and to University Authorities. These allegations were lodged against ROTC instructors and the University. The plaintiff's internal investigation revealed that each of the students allegations were credible. In Morris, the 10th Circuit Court of Appeals ruled: **"We reasonably infer from the pleadings that Plaintiff's contend that the university is liable to them for the harm they have suffered as a result of the sexual harassment and hostile environment created by a fellow student and an ROTC instructor because the University knew of harassment in a University program and did not respond adequately**. We hold these pleadings are sufficient to state a title IX Claim against the University under the illuminating Supreme Court opinion in Gebster. See 118 S.Ct. at 1999". The Tenth circuit ruled that the District Court's dismissal of the claim was erroneous. In Zentgraf v. Texas A. & M. University, 492 F. Supp. 265 (S.D. Tex 1980), the court addressed and found that an ROTC party is not an indispensable party to litigation. Federal regulations affecting ROTC programs clearly establish that the Commandant of an ROTC unit is responsible to the authorities of the host institution for conducting the program in accordance with institutional

rules, regulations and customs. 32 C.F.R & 562.4(e) ... [T]he head of the institution exercises the same control over the department of military science as he does over the other departments of the institutions. 32 C.F.R. & 562.5.

The office of the **Army Chief of Staff Army**, Colonel William Parnell remarks in sworn deposition: He states:

> **All of those things that came out of the investigation , to me don't hold water. They don't hold water because they were incomplete and protective. And all they did was to maintain the lily white atmosphere in which the ROTC program was alleging to have painted. I'm sorry if somebody will correct me. They had a sizable pot of money, and now this cadet fund was used to pay air fare and other expenses . . . Come on! So when I read that, that caused me to read a lot deeper. I think it was a bunch of crap. I think it was put together in a way that would maintain the image of every thing being in accordance with absolutely simon-pure propriety at the University". "I am surprised that the General let it happen like it did . . . but it is bothersome to me that the integrity of the system is so full of holes".**

In an appeals from the United States District Court for the Northern District of Texas to the 5th Circuit Court of Appeals decided February 23, 2000, First Amendment retaliation claims of two police officers against the City of Garland ("City"), its former Police Chief, and its former City Manager were argued. It argues that the "individual Defendants", and later the City, violated 42 U.S.C. § 1983 by retaliating against the Plaintiffs for making public allegations of corruption in the Garland Police Department. The jury found the individual Defendants liable, and even after a large remittitur was accepted by the Plaintiffs, the district court entered judgment exceeding $8 million, plus attorneys' fees, for the Plaintiffs. The Appeals court concluded that the judgment is fatally flawed because the Plaintiffs failed to prove that official retaliation against them was sufficiently serious to constitute a constitutional injury. In Boswell, a constitutional injury is shown. In the City of Garland, this District Court first held that the statute of limitations barred all of the Whistle blower Act claims and later the district court granted summary judgment on the Plaintiffs' § 1983 claim. The City was found liable under the Whistleblower Act for actual damages and punitive damages. The court entered judgment on the verdict but then responded to City's Motion for Judgment as a Matter of Law on the Whistleblower Act claim, holding that plaintiff had failed to exhaust his administrative remedies. Boswell was required to exhaust his

administrative remedies as required by the whistle blower Act. Boswell's affidavits will persuade the jury that Boswell was an object of a vendetta by the Defendant's employees which became a continued reprisal situation and environment escalating to the employment in the Texas National Guard. The Governor through his Texas Adjutant General powerfully influenced the termination decision from the Army and Guard by showing indifference, and withholding a direct reprisal finding that if available for Federal Court proceedings may have altered the District Court's ruling, and rather than against, may have been so compelling it would be in favor of the plaintiff. The corroborating testimony, plaintiff has now, unavailable to the court in the wake of critical suspense, consist of a serious allegations against the TCU and senior leadership and now Major General James of the Texas National Guard. The reprisal establishes a constitutional claim for retaliation. Concerning the exercise of one's First Amendment rights, four elements must be and are shown: First, the Plaintiffs must suffer an adverse employment decision. Second, the Plaintiffs' speech must involve a matter of public concern. Third, the Plaintiffs' interest in commenting on matters of public concern must outweigh the Defendants' interest in promoting efficiency. Fourth, the Plaintiffs' speech must have motivated the Defendants' action. Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 220 (5th Cir. 1999) (citations omitted). In the City of Garland, the district court ruled as a matter of law on the Whistleblower Act claim. "The exhaustion requirement of the Texas Whistleblower Act is jurisdictional and, therefore, mandatory and exclusive. *See* Essenburg v. Dallas County, 988 S.W.2d 188, 189 (Tex. 1998) ("It is true that a plaintiff's failure to exhaust administrative remedies may deprive courts of subject matter jurisdiction in the dispute ... [since] the exhaustion requirement seeks to assure that the appropriate body adjudicates the dispute -- the hallmark of a jurisdictional dispute."). Moreover, the Whistleblower Act requires "the employee to utilize all procedures in place for resolving disputes at the governmental entity." Gregg County v. Farrar, 933 S.W.2d 769, 775 (Tex. App. -- Austin 1996, writ denied)". The University has an Internal Grievance Affairs process broad enough to encompass claims against the Dean. Under the grievance policy committees are set up to investigate complaints of misconduct, retaliation, sexual harassment, racial discrimination. Plaintiff had no choice but to pursue the government remedy as directed and

ordered. The administrative remedy was not available to Boswell. Retaliation for filing a complaint against sexual harassment is prohibited". Handbook for Texas Christian University Faculty and University Staff, pg 47. "Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." Pierce v. Texas Dep't of Criminal Justice, Institutional Div., 37 F.3d 1146, 1149 (5th Cir. 1994). The University's requirement for plaintiff to undergo a psychological exam is not an adverse employment action however this had an adverse effect. No other cadre member wanted this treatment so it affected the quality and ability for plaintiff to prepare a defense. Witnesses were in support of TCU conduct due to fear of reprisal. Accompanied by the daughter, in Stanley v Illinois, 405 U.S. 645 (1972) the Supreme Court found that the nurture and care for the child has found protection in the Due Process Clause of the XIV amendment, and in Hodorowski v Ray ID at 651, 5th Circuit recognized an essential basic concept of familial privacy, the right of the family to remain together without the coercive interference of the awesome power of the state 844 F.2d 1210, 1216 5th Cir. 1988. As the Click court stated, the government "'*may not deny a benefit* to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech.'" 970 F.2d at 109 (quoting Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972)) (emphasis added). Some benefit must be denied or some negative consequence must impinge on the Plaintiff's employment before a threat of discharge is actionable *See also* Bickel v. Burkhart, 632 F.2d 1251, 1255 n.6 (5th Cir. 1980) ("impermissible retaliation [need] not result in the termination of his employment" in order to be actionable under § 1983, but the employer's actions must alter "important conditions of employment") A reasonable motive for TCU General Counsel's attorney, Mr. Guinsberg, participation in the joint conspiracy to avoid ethical scrutiny, court suspension, or disbarment. Attorney Ginsburg's letter presents conflict of interest. As Mr. Guinsberg responds (dual hatted) as TCU authority (General Counsel) to "desist all further communications" he infringes on the appellant's right to prepare a legal defense. When he acclaims: "matter lies exclusively with the U.S. Army and not with TCU or any parties associated with TCU" this is a dispute, misrepresentation of law and facts of law. The merits of the case and Mr. Guinsburg inappropriate conduct is reason for an equitable action in favor of the injured party. Attorney Ginsberg's unbecoming conduct infringes on constitutional protected liberties. The

enforcement clause in the fourteenth amendment states in part, " no state (or of one acting under the color of authority) shall ... deny any person within its jurisdiction the equal protection of the law." The conscious of the court should be offended by the mistakes, overt acts of misconduct, abuse of discretion, clear errors of fact and law. Mr. Ginsberg's threatening letter to plaintiff was "deliberately indifferent" and cause for a constitutional violation. In "assessing an individual supervisor's liability under § 1983," the Fifth circuit applies the City of Canton standard of municipal liability. Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 (5th Cir. 1994)(en banc). Under this standard, a supervisor is liable under § 1983 only if (1) his conduct directly causes a constitutional violation or (2) the plaintiffs can show that the supervisor was "deliberately indifferent" to a violation of a constitutional right. *Id.* at 454 n.8. (citing City of Canton, 489 U.S. 378, 388 n.8, 109 S.Ct. 1197, 1204 n.8 (1989)).

***See* Tex. Gov't Code Ann. § 554.006(a) (West 1994)** ("An employee of a local government must exhaust that government's grievance or appeal procedures relating to suspension or termination of employment or unlawful discrimination before suing under this chapter.") (amended 1995). The allegations of corruption are true and such allegations are matters of public concern and outweigh the government's interest in efficiency. *See* Teague v. City of Flower Mound, 179 F.3d 377, 381 (5th Cir. 1999); Brawner v. City of Richardson, 855 F.2d 187, 191-92 (5th Cir. 1988) The disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of law enforcement personnel. This subject remains a subject to the threshold public concern requirement. Boddie v. City of Columbus, Mississippi, 989 F.2d 745, 747 (5th Cir. 1993).

Plaintiffs asserts a **defamation claim separate from § 1983 action**. The stigma plaintiff has derived from the injury to his reputation, an interest that [Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976),] may not rise to the level of" a Fourteenth Amendment violation Moore v. Otero, 557 F.2d 435, 437-38 (5th Cir. 1977) but the stigma coupled , with impact on two termination actions and related infringements, constitutes an adverse employment action. *See* Blackburn v. City of Marshall, 42 F.3d 925 (5th Cir. 1995) ("We have applied the

holding of Paul by requiring a section 1983 plaintiff to show stigma plus an infringement of some other interest." (citation omitted)).

My case depicts several violations of state law: Retaliation, Adultery, Reporting pornography in the work place twice (which coincidentally ended in arrest with one employee),and misapplication of fiduciary property. The complaint involves more than an employment dispute. In the sexual harassment suit against the Army, Plaintiff Theorit was awarded $ 500, 000 in damages. The agency's previous reprisal decision to compel victim to psychiatric testing and examination requires consideration because of the prejudice damages as authorized by **5 U.S.C. 1221 and or 1214 and compensatory damages by section 102 Civil rights Act of 1991 (42 U.S.C. 1981a unlawful intentional discrimination).** Employee believes the agency committed harmful procedure error.

The Agency violated **Title 32 CFR 588.26.** It states: (d) Army action will require remedial action desirable to resolve issues and (e) if discrimination or reprisal is found and there is an attorney of record, complainant will be advised that attorney fees and/or costs maybe awarded.

Similar to EEOC and Mary Boyle v. Gallagher Co., No. 98-20351(5th Cir. July 15, 1999), the employee argues that the TCU breached its employment contract. The Trustees denied notice or hearing and these institutions deprived employee of procedural and substantive due process rights **(42 US.C. 1983)** and violated education discrimination for institutions receiving federal assistance reached by **Title VI of the 1964 Civil Rights Act, 42 U.S.C.A. & 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C.A. & 1400 & 1681.** The TCU chancellor had final authority and violated the terms of the University handbook and DoD agreement. A hostile working environment ending in an involuntary termination, and violation of prohibited personnel practices found in AR 27-40. Reporting unlawful prohibited practices was the nexus and causal effect to the harassment and termination

In Rhorer v Ratheon Engineers (No. 98-20347), July 15, 1999, the court found there is sufficient evidence of reliance. Similarly to Rhorer, employee has cited examples of employer intrusions of policy and regulation. The employee was briefed on employment by the Texas National Guard and provided a policy on benefits, rights,

and privileges. Sergeant Clinton Payne's testimony corroborates agency animosity and different treatment to those submitting an complaint. He states: "instead, he was persecuted." In Rhorer, the circuit declared that ambiguities in the contract are to be resolved against the drafter, in the employees favor in accordance with the rule - *contra proferentum*. The circuit notes: "we have serious doubts as to whether the Texas doctrine of *quasi estoppel* could be applied in this action".

Under Hansen, 940 F. 2nd 971 5th Cir 1991, a precedent was set concerning a benefits plan. No mention was made that if the ABCMR ruled in the employee favor that Civil Service Pay (approximate $ 34,000) would be recouped. Otherwise plaintiff would work, like peers, for private industry.

Claim under 29 U.S.C. 1132 (a) (1) (b) provides a civil action may be brought by a participant or beneficiary to recover benefits, enforce rights, or clarify rights under the terms of the plan. **29 U.S.C. 1109** states any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed shall be personally liable to make good to such a plan any losses and subject to equitable or remedial relief. Employee references **FMLA & 2601 and 2615** for avoiding the harm to family as family member witnesses this tragic, humiliating, embarrassing event.

Reprisal and termination is a material breach to employee contract. In Varity, the Supreme Court observed than an ERISA plaintiff may bring a private action for breach of fiduciary duty only when no other remedy is available under **29 U.S.C. & 1132**. Varity Corp v. Howe 516 U.S. 489 (1996) at 1077-1079. Even if agency could show that employee beached contract in response to defendant's breach, Texas Supreme Court in Mead v Johnson Group, 615 S.W.2d, 685 (Tex.1981), controls in permitting recovery.

The fact discovery rules were violated lends credence that summary judgment based on misrepresentation, neglect, and fraud requires vacating. Mawby v U.S. 999, F2d 1252, 1258 (8th Cir, 1993), "rules are meant to insure that parties can obtain mutual knowledge of all relevant facts gathered by both parties".

5th Circuit ruling Fadeyi v Planned Parenthood 97-11310 11 Nov 1998 appears to strengthen civil rights. The Supreme Court tested Whistle Blower doctrine in Sterner v Marathon Oil Company. 5th circuit applied the Texas Whistle Blower Act in Knowlton v Greenwood Independant School District. System corruption is

dysfunctional: It blocks social reform and in this case has caused damaged to the Texas National Guard and members.

The employees case is comparable to the Texas Whistle Blower case in Green, and Civil Service United States Whistle Blower case in (Haley). Defendants have commited actions of intimidation, defamation to character, retaliation, and injury to family. The Defendant's conduct was willful and in bad faith. (USX Corp., 68 F.3d at 819; Dorsey v. Scott Wetzel Serv., Inc 84 Al-Torki, 78 F.3d at 1384). The agency actions have caused injustice not only to plaintiff, but to the community, the public and to future minorities, sons and daughters as they encounter corruption. A fight for a public cause is worth it so that new, impressionable, recruits are free from abuse.

Biblically, 1 Corinthians 13 6-7, Love rejoices with truth: It always protects, always trusts, always hopes, always perseveres. Noting Supreme Court decision May 24 1999 in Davis v Monroe County Board of Education et al. Plaintiff's conduct of reporting the leader abuse created an intimidating, hostile, offensive, and abusive ROTC school environment that violated **Title IX of the Education amendments of 1972**, which in relevant part, prohibits a student from being "excluded from participation in, be(ing) denied the benefits of, or be(ing) subjected to discrimination under any education program or activity receiving federal financial assistance, **86 Stat. 373, as amended, 20 U.S.C. & 1681 (a).** Appellant's student who had sexual intercourse with the Army ROTC Sergeant was requested to leave the ROTC program and plaintiff lost his student privileges, too. Gebster v. Lago Vista Independent School District concluded a recipient may be liable for damages under **Title 1X.** Liability is also found under Title VI in Guardians Assn. V. Civil Service Comm'n of New York City, 463 U.S. 582, 598-599 (1983) (opinion of White,J.). While the Eleventh Circuit affirmed the district court motion to grant dismissal, Honorable Justice O'Conner, in Supreme Court decision, Davis v Monroe County Board of Education et al., delivered the Court's opinion to reverse and remand. The court has held that due process requires "at the very minimum, "that a student facing suspension be given some kind of notice and afforded some kind of hearing". Goss v. Lopez, 419 U.S. 565, 579 (1975).

Plaintiff meets the three conditions of intentional discrimination and the four principle elements of retaliation supplied to the jury in the 10th Circuit Court of appeal No 96-4155 Gunnell v. Utah State College 08/19/1998. Plaintiff, comparable to Gunnell, evidence of management's retaliatory conduct is more convincing and such to hold the Trustees liable for a co-worker retaliation claim. In Gunnell, the 10th circuit reversed District Court ruling on the hostile environment claim in favor of plaintiff.

Testimony from the Black Sergeant Major previously wrongfully terminated prior to plaintiff.

"The DOD Whistle Blower investigation found reprisal. Army investigations disguised the truth to avoid negligent misconduct, potential media coverage, and damage to the reputation of the University and the Army. Drill sergeants can't have sex with recruits. ROTC instructors can not have sex with cadets. TCU retaliated against Major Boswell. Major Boswell's due process was violated. Any one reviewing the TCU General Counsel Letter to Major Boswell ..... can see this. It deprives Major Boswell of constitutional rights. Major Boswell and I are Vietnam Era Veterans. How can a University in receipt of federal funds disbar a federal employer from campus as TCU and the Army did to both of us? Major Boswell did not have a chance for survival in a corrupt environment. This prompted me to try to help him. The investigation ... was a cover up and I believe that the University was a joint conspirator. The University had ROTC oversight responsibility. The University knew about the slush fund, was a recipient of the money. When Dean McCracken states he found no evidence of misuse after Major Boswell provided the Dean with an audit and copies of the checks, this shows me that he washed his hands and ignored criminal activity. The Dean took a similar approach when responding to ROTC student sexual harassment complaints. When the TCU General Counsel wrote Major Boswell a letter requesting that he "immediate cease and desist all further communications with TCU, its faculty, administration, students, and board of trustees" that reveals the University's role in the conspiracy and cover up. It seems that the Dean and the Lieutenant Colonel Stacy were in joint conspiracy to harm this officer. I am not sure about the motive other than to continue their abuse of cadets for personal gain and power. The check made out to TCU for $ 2635 ...while I was the Sergeant Major may be as good as motive as any. TCU officials benefited from the fund. The cadets were never paid back to my knowledge. Major Boswell's audit shows over $ 14,000 of expenditures. The Dallas ISD superintendent went to prison for a similar offense. Instructors spied on

Major Boswell ... to find something, anything, no matter how trivial, to discredit this officer. That is the reason they detained and escorted this officer to the hospital for psychiatric evaluation. He was accompanied by his twelve year old daughter. Supervisors at Texas Christian University were corrupt. They should be held liable. The Dean definitely knew about the racial difficulty, the fund, the Rape Charge and the adulterous affair before he recommended Major Boswell's dismissal. Major Boswell was wrongfully discredited and defamed by Texas Christian University and Department Army officials. This is obvious in TCU memo to all ROTC cadets ..... While Lieutenant Colonel Stacy Sergeant Major, I also was discredited simply because I would not condone unethical behavior. My removal, as Major Boswell, was not because of unprofessionalism, misconduct or substandard performance, but in retaliation for raising discriminating complaints. Army investigations served to protect the Dean and LTC Stacy and to make it look like their actions were legal to get rid of any one who challenged illegal conduct. The investigations were nothing but a tool to obscure violation of state and federal statutes. My affirmed conclusion is that Mr. James Boswell performed a constitutional duty and he was unnecessarily punished. I hope that Texas Christian University and the United States Army will be accountable for damages. Major Boswell was victim of conspiracy and defamation of character. I hope that a federal judge will see the error in the University and Department of the Army ways. Again, I will be happy to testify before a Board of Officers or a Federal judge. I would like to see Major Boswell receive an award of damages for loss of employment for all those years and for the pain and suffering that his family had to endure".

Texas Christian University officials meet the Supreme Court's definition for being a supervisor; Title VII and Title IX statutes make employers liable for the discriminatory acts of their "agents," and supervisors are agents of their employers. **Title IX of the Education Amendments of 1972: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal Financial assistance" ... 20 U.S.C. & 1681 (a).**

Appendix I

Administrative Orders

Administrative Agency Opinions

Materials Essential to the Understanding

1. Department of the Army orders, December 10, 1998, the Department of Army provided orders revoking Plaintiff's discharge orders from the Army in 1989, again as direct result of the TCU experience. The Secretary of the Army provided retroactive retirement orders, effective May 1993 as an Army Major 0-4. The Military back pay act allowed Plaintiff to be compensated for back wages from April 1989 until May of 1993 and compensation for retirement pay from June 1993 until February 1999. In March 1999, plaintiff was placed on retirement status and received the first monthly check. Extracts of the relevant pages are provided at the end of this appendix.

2. Opinions.

The Army Discharge Review Board (ADRB) concluded the Texas Christian University efficiency report was issued in reprisal for Plaintiff's whistle blowing activity. Further, the ADRB concluded the Plaintiff's record of performance *clearly* did not support a discharge for substandard of performance of duty, and the discharge was inequitable (exhibit 1, page 2, par 4 of original complaint).

Army Board for Correcting Military Records (ABCMR). Plaintiff submitted a petition on 8 August 1996 to the ABCMR referencing the **DOD Inspector General Investigation Report 10 U.S.C. 1034** Case Former Major James D. Boswell (Military Whistle Blower Reprisal). On 21 May, 1997 the Army Board of Military Records granted partial relief from plaintiff reporting to Dr. Dean McCracken of Texas Christian University and Lieutenant Colonel Leeper of the Army Inspector General what plaintiff believed to be a violation of **Title 10 paragraph 3729, False Claims and violation of Public Law 103-337 Oct 5 1994 Victim's rights, family advocacy, and nondiscrimination provisions sec 531** which covers the prohibition of retaliatory actions

against members of the Armed Forces making allegations of sexual harassment or unlawful discrimination. Since Texas Christian University faculty and military officers personally benefited from the fund, Plaintiff had reason to believe Dean McCracken and senior military officers and non commissioned officers conspired to commit this second degree felony. Plaintiff refused to operate the fund in an unlawful manner. Within two days of reporting violation of federal and state statutes, Dean McCracken provided written termination of the plaintiff's discharge and the injury began. Under the provisions of the **Administrative Procedural Act (APA), 5 U.S.C. 702**, Plaintiff seeks review of the ABCMR decision for the decision was lacking in equity. In accordance with **Title 28 U.S.C. 2401 (b)** this cause of action also serves as notification of claim against the Department of the Army and request that the court waive sovereign immunity. The plaintiff challenges the Army Board for Correcting Military Record's final decision. The statute of limitation should begin December 1999 and under a worse case scenario 2 years after the interim decision of May 21 1997.

Secretarial Authority first decision gave the appearance of cover-up. The Secretary considered the ADRB recommendation as invalid (exhibit 1, page 10, para 2). In November 1993 the Deputy Assistant Secretary of the Army recommended to the Secretarial authority that the Plaintiff's appeal be denied. But this caused scrutiny from Committee members from the Senate Armed Services. The former chairman of the committee Senator Nunn requested plaintiff receive a fair hearing. This law maker obviously wanted to show that taking care of the Plaintiff as and other soldiers in similar predicaments, is a national priority. Plaintiff then appealed to a higher authority, the Secretary of Defense. In the interim, the Assistant Secretary of the Army Honorable Sara Lister concurred with the findings of the Army Discharge Review Board and granted the relief recommended in the Department of Defense Inspector General Report.

Department of Defense Inspector General Report. DOD Inspector General Investigation Report **10 U.S.C. 1[illegible]** Case Former Major James D. Boswell (Military Whistle Blower Reprisal). Plaintiff provides the DOD Inspector General report in exhibit 1 on page 6, last line, *In Mr. Boswell's case, the fact he engaged in whistle blower activity is not in dispute.* Plaintiff provides the investigator's quote on page 1, second paragraph that the Acting Assistant Secretary of the Army for Manpower and Reserve Affairs and the Secretary Review authority

concerning the decision by the Deputy Assistant Secretary of the Army for Review Boards and Equal Employment Opportunity Compliance and Complaints. The report states that he now believes he made the wrong decision and characterized it as *arbitrary* and contrary to the principles of equity he generally employed in similar circumstances.

Opinion of the Texas' Veteran Commission. Veterans Commission interest. The Texas Veterans Commission states: "From an institutional memory standpoint we have represented 250 cases. Army and Texas Christian University authorities have substantially denied our client due process. Recommend full relief."

3. Materials essential to the Understanding. The remaining part of this appendix is devoted to Blowing the Whistle on Systemic Corruption, Federal Court Rules, and concerning the revised standards provided by the EEOC.

Judith Truelson in her thesis on Blowing the Whistle on Systemic Corruption in May 1986 states:

> **"By its very nature system corruption is a secret activity. Those who indulge rarely publicly admit it. Watergate and attendant scandals only temporarily revived interest in public ethics and failed to make up for decades of benign neglect. In reality, however systemic corruption is always dysfunctional. It is self-perpetuating; it blocks social reform and organizational change, it undermines the willingness of people to make sacrifices, necessary to change. Systemic corruption thrives whenever people are alienated from public authorities. The absence of a civic virtue and a sense of community breeds systemic corruption. Alienated people are powerless, dependent, and desperate- easy marks for corruption (pg 23). Despite both public and private sector statutory limitations on organizational prerogatives, structural barriers to legal actions against organizations such as statutory bias, statutory procedural and administrative deficiencies, and narrow and incoherent interpretations cripple what ever potential the law may have for reducing the incidence of organizational retaliation against whistle blowing (pg 46). Compensatory or reward power ensures obedience through compensation".**

Chronology of Events.

23 February 1998	Plaintiff sued Defendants
1 February 1999	District Court filed order for defendant granting summary and final judgment
5 February 1999	Plaintiff is terminated from employment with federal service (Since then, plaintiff remains unemployed)
1 March 1999	Plaintiff receives first monthly pension check previously deprived. (Plaintiff was deprived a monthly pay entitlement from 12 April 1989 to 1 February 1999 as a casual effect from reporting protected disclosure while assigned to TCU.
5 March 1999	4th Circuit decision to remand a Title IX claim (Petition for a Writ Of Certiorari To the United States Court of Appeals No 99-5 In the Supreme Court of America, Petitioner v. Antonio Morrison
8 March 1999	An Army Lieutenant Colonel provides statement of TCU conspiracy
23 March 1999	Senator Gramm's letter to Senate Armed Service Chairman Senator Warner renewing public and community interest and forwarding plaintiff's request to appear before a congressional committee.
2 April 1999	Plaintiff reports conspiracy to the FBI
15 April 1999	A Navy Captain's Investigation finding of additional reprisal is released to plaintiff for the first time
25 May 1999	The United States Army provides plaintiff with a monetary settlement besides the retroactive retirement. (The settlement was returned)
1 October 1999	Plaintiff's appeal to the EEOC
16 December 1999	5th Circuit asserts lack of jurisdiction to Plaintiff's appeal of District Court Order of summary and final judgment.
17 March 2000	Rehearing denied. enbanc

Exhaustion Remedy. The misconduct contributed to a social ill. Due to the military service connection TCU had with the government defendants, plaintiff was required to exhaust intra service administrative remedies (Von Hoffburg v. Alexander 615, F. 2d 633, 637-38 95th Cir. 1980).

No default notice. Plaintiff sued defendants on the bases of discrimination based on sex, race and anti discrimination law, retaliation for protected activity, wrongful employment actions and received court ruling 29 January 1999, by default, but without notice of a default judgment. Regardless, the vicarious liability rule applies to unlawful harassment on all covered bases and plaintiff's claim is meritorious.

New Evidence. Affidavits dated January 2000 and thereafter offer new proof of a meritorious defense, defendant fraud, misrepresentation, and conspiracy. The affidavits are readily available to show the defendant's malice and recklessness, joint conspirator's role and reason for liability. The nature of the evidence is such to shock the court's conscious. The evidence is decisive, relevant, admissible, and will be helpful to the jury. Newly discovered evidence concerning the improprieties included four accounts of mistreatment of four black minorities: (assignment cancellation, a faculty staff member's unlawful termination, a student termination, adverse ratings) and new evidence of retaliation for plaintiff's opposition of the anti discriminations statutes. One of the witnesses initially who was in support of defendant and in joint conspiracy surprisingly switched his testimony after the entry of the judgment. This has caused a domino effect and has fulfilled a piece of a puzzle unavailable for the court when it granted defendant judgment. He identifies the Dean as a conspirator. He declares that one of the black minorities, referred to above, suddenly disappeared - is missing. The logic of the court ruling in January 1999 can now be shown to be faulty. Plaintiff's deposition, which the court relied on, is no longer accurate. Newly discoverable evidence has motivated witnesses to become readily available to corroborate existing testimony. The fact that defendant concealed the black man's sudden disappearance, during diligent discovery, is now an additional material fact, and additional grounds for relief from judgment.

Renewed Public Interest. United States Senators show interest for public concern (23 March 1999). Plaintiff's action served legitimate interest: Senator Nunn concludes: "Mr. Boswell was subject to retaliation for whistle blowing". Although the Department of the Army expunged the Texas Christian University negative evaluation

caused by Dean McCracken, the damage to family is unrepairable supported by affidavits (Darnell, V. Boswell, Mroski and J. Boswell). Darnell affidavit is newly discoverable action which shows TCU negligence. Senator Gramm on 23 March 1999 forwarded to the Chairman of the Senate Armed Services Committee plaintiff's request to testify before a committee hearing.

District Court is partially at fault. District court inadvertence to correct misunderstanding concerning plaintiff's appeal relating to the court record has prejudiced the case. Plaintiff relied on the District Court entries. Federal Rules of Appeal procedures 3 provides appellant the right to appeal. According to **FRAP 3 a (2)** an appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal. Concerning **FRAP (c) (1)** contents of the appeal must (a) specify the party. Plaintiff did. (b) designate the judgment. Appellant does by filing date, 1 February 1999. **FRAP (c) (4)** states an appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. 2/9/99 Entry 42 of the District Court Docket states "Notice of Appeal by James D. Boswell and appeal 1/29/99 final judgment ... plf is pro se ... no hearing/trial held ..." The District Court docket clearly evinces the party's intent to appeal and on 2/10/99 serves a notice of Appeal and certified copy of docket to USCA: .. along with a transmittal letter. All the required documentation is on the District Court's transmittal letter in ref Notice of Appeal explicitly stating "Appealing: Final Judgment 1/29/99" A second court letter/document evinces plaintiff's appeal. This letter confirms the information required by FRAP 3 (c) "contents of the notice of appeal required". On the second page of the District Court's letter, the deputy clerk notes that letter was sent to the parties. The court docket concludes "2/16/99 USCA appeal fees received $ 105.00 (42 -1) Appeal Receipt #28107 from James D. Boswell". This was the second time plaintiff paid for an appeal fee. On 8/12/98 plaintiff paid an initial $ 105.00 appealing the dismissal of the U.S. defendants. In a letter dated, July 29 1999 the defendant acknowledges "appellant's appeal of Summary and Final judgment. Almost a year of the judicial process was lost by the misrepresentation.

Due to the extraordinary circumstances and under FRCP 60 (b) 6 relief is warranted (Cavaliere, 996 F. 2d at 1115). Plaintiff requested the District Court, reference FRCP 59 (e), to alter or amend judgment. District Court

dismissal of U.S. defendant's with prejudice and grant of summary and final judgment to TCU defendants without access to Plaintiff's Summary Judgment response warrants a reversal in the summary and final judgment.

Rule 59 (e) "is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." Plaintiff asserts each of these defenses. Multnohah County, 5.3d at 1263. Plaintiff requests relief from judgment based on rule 60 (b). See School District No.1 J, Multnomah Couty v. AC and S, Inc 5 F.3d 1255, 1262 (9th Cir. 1993); Lavespere v. Niagara Machine & Tool Works, Inc,. 910 F.2d. 167, 173 (5th Cir. 1990). Essentially the district court applied a default judgment. Plaintiff responded late by one day but due to military justifiable reasons.

Rule 55 (b) (2) was promulgated to protect a party who although missed the suspense of the formal pleading have otherwise indicated a clear purpose to defend the suit. Key Bank of Kuwalt v. Tablecloth Textile Co 74 F. 3d 349, 353 (1st Cir 1996). Once plaintiff 'has appeared' for default purposes, he was entitled to notice of application for default judgment under rule 55 (b) (2). Plaintiff has 90 days to file a motion to vacate judgment but this should be tolled because of the appeal. 50 U.S.C. app 520 (4) 1988. From 2/1/1999 until Appeal court dismissal 12/16/1999, the injured party diligently pursued the appeals process. Dismissal of U.S. defendants forced plaintiff to sever the civil service and Army complaints from complaints against TCU. Plaintiff pursues the involuntary termination from civil service 5 February 1999 to the EEOC (accepted 1 October 1999). The amended complaint against the Secretary of Army was accepted by the Army Board for Correcting Military Records (7 July 1999). The United States Court of Appeals (USCA) ruled 16 December 1999 (ten months and sixteen days from the judgment)) that the USCA lacks jurisdiction to decide the appeal of the District Court's ruling on Summary and Final judgment (signed 1/29/1999 and recorded 2/1/1999) in spite of the court's record showing that the transmittal record, payment of court fee, and District Court entry NO 42 evinces the 1/29/99 order for appeal.

Imposition of conditions. One of the defendants, the Secretary of the Army, after the DC court's judgment, provided a recent settlement May 25 1999, for ten years of pay entitlement (since discharge April 1989). This should have prospective application as admission to wrongful actions, liability and award of damages. Plaintiff's claim for liability is joint and several.

FRCP (60) provides that a court may relieve a party from a final judgment upon "such terms that are just". How one of the joint conspirators is liable while the other escapes accountability is a question and issue for trial. **FRCP 54 (b)** allows the court to consider the Secretary of the Army's final decision and settlement and revise the final judgment. Plaintiff requests the court intervene of right.

The Soldiers and Sailors Civil Relief Act of 1940 protects members of the armed services from default in civil litigation. **50 U.S.C. app & 520 (1). (1988).** Defendant's status was a Sergeant in the military, assigned at the 2nd Brigade HQ, 49AD Fort Worth Texas. In accordance with **O'Conner's rules Chapter 7 A 3.3 (2)** the court may have been required to appoint a lawyer to represent plaintiff. In Chapter 7 A 3.4 it states see **FRCP 55 (b) (2)** if a defendant (party) appears after the entry ... he is entitled 3 days' of the application for hearing. Plaintiff only needed one day of grace to complete the filing. Prior to the summary judgment and final order, but on the same day of suspense 29 January 1999, Plaintiff received the approval of the opposing party and faxed a response dated 29 January 1999 to the court stating his attention to defend and that filing would occur the following day. This was within the spirit of **FRCP Chapter 7, 3.6 (2)** "or taken some other action to other wise defend". In applying the law, Plaintiff did not default . He took quick action (Pretezel & Stouffer, 28 F.3d at 45) and filed the response to summary judgment the following day. This is where plaintiff questions an error concerning the court docket integrity of the difference in the stamped date on filing documents. (The original appears altered and different than plaintiff's copy). On 29 January 1999, Plaintiff was physically unable, very sick, complied with his military supervisor and followed correct sick call procedures. Plaintiff could not file the document as required and took responsible action. The judgment violated the spirit of **FRCP 55 (a)** and it continues to prejudiced plaintiff.

Defendant can not show any culpable, willful misconduct on plaintiff's behalf. Plaintiff provides a meritorious defense and Summary judgment should have not been granted due to the lack of sufficiency of the defendant's claim. Adhering to O'Conner's rules, the court is to consider two other factors that plaintiff is pro se (Enron, 10 F.3d at 96) and that judgment will bring about a harsh and unfair result (V. Boswell and Mroski affidavit). Any doubt whether some action constitutes an appearance should be resolved in favor of a finding of the party who made an appearance. In re Roxford Foods Inc, 12 F.3d.875,881 (9th Cir 1993) N.Y. Life Ins. Co v. Brown , 84 F.3d 137, 141-142 (5th Cir.1996). The court only heard TCU version of events.

"Defendant 'otherwise' defended". The spirit of Federal Rules Chapter 7 A. 3.6 2 allows the court to rule in plaintiff's favor on any of the following justifications concerning the interpretation of "Defendant 'otherwise' defended" . Count one is number (2) in the rules that a conversation between counsels for the parties existed. (On the day of judgment, plaintiff acquired the defendant's blessing to file late a day and defendant instructed the plaintiff to notify the court. Count two is (5) in the rules a stipulation requesting extension of time (plaintiff by fax requested one) and justification three is (8). Plaintiff provided a fax letter to the court.

Newly Discoverable Evidence. The court in its 29 January 1999 order did not have access to the testimony of conspiracy corroborated by affidavits from Lynn, Hayhurst, Darnell, Fant, Bice, Bright, Ezell and letter by Senator Gramm. Lieutenant Colonel Bright provided to the Assistant Secretary of the Army, 8 March 1999, an affidavit. It was forwarded to Senator Kay Huchison and Phil Gramm. Plaintiff highlights two phrases **"under orders"** and **"participant in the University conspiracy".** Bright states:

> **"I regret, even though I was under orders, that I was a participant in the University's and Army conspiracy to remove this outstanding officer from an ROTC assignment and from active duty. Now I firmly believe there is a criminal connection between three events: Reprisal - a black Sergeant Major's removal from TCU (2) Major Boswell's tragedy and (3) the sudden and unexpected disappearance from TCU of a black supply sergeant. He had completed an approximate eighteen years of military service. It is my testimony that Major Boswell's due process was violated and Army and Texas Christian University officials failed in their assessment and proceeded to hastily cover-up the situations. Major Boswell, tenaciously, reported violations of military and university policy dealing with sexual harassment and misconduct, discrimination**

concerning minority students and cadre, and misapplication of fiduciary property. I witnessed a gross injustice perpetrated against Major Boswell and his family. My professor of military science, the Dean for Army ROTC Affairs, and former commander of Major Boswell conspired with an intent to harm Major Boswell and his family. Due to conduct unbecoming of an officer, issues as an adulterous affair, there is ample motive why the conspirators wished harm on Major Boswell. Truth may have ended the University's and Military officials' careers. Please review the enclosures and reopen this case".

The new evidence is admissible, is credible, and is material and controlling (Peyton Place, 62 F.3d at 771): **FRCP 60 (b)** does not limit the party of a court to entertain an "independent action" for relief of judgment See, e.g. In ref Hunter, 66F.3r 1002, 1005 (9th Cir.1995); Robinson v. Volkswagenwerk AG, 56 F.3d 1268, 1273-74 (10th Cir.1995); Hodges v. Yonkers Racing Corp., 48 F.3d 1320, 1325, (2d Cir.1995). Under theories of negligence and conspiracy, a jury was requested to review issues of material fact and confirm or deny consequential injuries naturally flowing from the employer's wrongful conduct, such as pain, suffering, and loss of reputation. Liberal view of relief is warranted for substantial justice. Claim is not resolved by judgment. Dispute is unresolved and has potential to escalate. Students complained about sexual harassment, racial discrimination, fraud and commander abuse. TCU only disputes that plaintiff reported racial discrimination.

Plaintiff states in the IG report: (Excerpts to the 5th Circuit Volume II page 000283),

"I recommend DA Equal opportunity investigate the unfair treatment concerning three black NCO's and the only black MS III cadet in ROTC. LTC Stacy declared a black cadet a misfit and stated he was totally incompetent. Blacks were referred to as Niggers. LTC Stacy physically and mentally harassed and intimidated SGM Fant, rejected SSG Dunlaps assignment to ROTC, initially gave SFC Brown and SGM Fant substandard (performance evaluations). Supplied by Boswell, verified by Fant, Bice, Lynn

Consider the appropriate state and federal anti-retaliation statutes. Notions of acceptance and equality are undermined. Plaintiff was singled out and subject to actions beyond what was reasonable. The courts ruling is substantially wrong in the suit in equity. A hearing was denied. Newly discoverable evidence to fairly adjudicate the impasse and disparity. The evidence clearly shows the injured party was harmed "for having aided or encouraged" the female who was victim in violation of military law, cadet victims of the slush fund, and

victims of discrimination as each of these parties exercised a right. Of the FBI factors which determine whether the incident is a hate crime, several exist. Clearly, the facts show that defendant's engaged in personal bias and an immoral, bias- motivated crime and incidents giving rise to bigotry.

Fant and Lynn **affidavits explain the lack of due process and procedural bias** of the investigations and discrimination against the black minorities. This evidence was unavailable to plaintiff until one of the conspirators broke the ice. In defendant's discovery (Dean McCracken's memorandum), he states "I examined the cadet fund records and found no evidence of misuse. (Redacted name) The Female cadet victim met with Dean McCracken, Associate Dean Priscilla Tate, and Dean of Students Libby Proffer. Ms _____ stated that on the afternoon of August 31 1986, SGM Vyers had intercourse with her without her consent. Also interviewed was SGM Vyers, Cadet Warren, Cadet Taylor, concerning alleged rape." New evidence concerning the truthfulness of the alibi testimony to the rape and to the competency and protective character of TCU and Army investigations is now available. Not only was Sergeant Major's conduct pervasive, it was criminal. He was the most senior enlisted Army ROTC member of the TCU faculty staff. Adultery is in violation of the Uniform Code of Military Records. Adultery is an issue and a violation of a Christian principle. Two Army General officers, since 1 February 1999, were court marshaled for similar conduct, but the media was very much involved.

Deprivation to Plaintiff in terms of a money entitlement (from 4/12/89 to 2/1/99) directly due to TCU careless tangible employer action had a causal effect for providing a defense and for acquiring a competent attorney. The Army's recent settlement May 25 1999 for ten years of pay entitlement (since discharge April 1989) should have prospective application and is reason for a new cause of action for TCU's mistake. Ezell's affidavit, a Marine Colonel/TCU alumni wrote to the Chairman of the Board of Trustees urging TCU liability.

Movant was not at fault or negligent. Plaintiff has shown uncompromising conviction to University policy and law and compassion for those he supervised. Ezell is an expert witness concerning experience with investigations and bias. This TCU alumni member, states in his letter (August 1998) to the Chairmen and Member's of the Board of Trustees:

"My distinct and affirmed conclusion is that Mr. Boswell reported several actions of impropriety by the Professor of Military Science at TCU. He subsequently was wronged and harmed by the institutions of TCU and the United States Army. I recommend that Texas Christian University recognize and bear responsibility for these wrongful actions and bring this case to a satisfactory disclosure."

New circumstances give rise to an additional cause of action and TORT claim against TCU Board of Trustees and against TCU insurance company, United Educators, Risk Retention, Group Inc which covers $ 100,000 per wrongful employment practice.

Management engaged in reprisal and deterrent action. The receipt of a government settlement (dated 25 May 1999 in favor of plaintiff) was a crucial event unavailable for the District Court's analysis and decision of summary/final judgment. The settlement concludes a strong inference that the government's misrepresentation, defendant's misconduct and position to conceal evidence prevented plaintiff from fully and fairly presenting its case during the District Court proceedings. The Army settlement affords partial relief from a military decision that was unfairly obtained because of TCU (a DoD affiliate).

There are too many material issues in dispute. Summary judgment should not have been granted due to TCU liability based on anti discrimination policy concerning sex, race, religion, and whistle blower protected activity. In reaching a determination, the court was substantially wrong if it was convinced that Defendant provided assurance of immediate and appropriate corrective action and enforced preventive and corrective measures. With this new evidence, the court can not in good conscious enforce the judgment.

TCU fails to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:(a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Inability for defendant to establish the affirmative defense in part because "its officials made no attempt to keep track of the conduct of supervisors." Faragher, 118 S. Ct. at 2293. "If the owner of the business commits unlawful harassment, then the business will automatically be found liable under the alter ego standard and no affirmative defense can be raised". A second prong of affirmative

defense was the employee's duty to exercise reasonable care to eliminate the risk of retaliation. Removing plaintiff from the TCU premises and barring Plaintiff from campus were actions in opposite to the grievance procedures contained in University student and faculty handbooks. Plaintiff was also a student at the University and was entitled due process through grievance procedures. Delay in investigation and delay in the release of the findings created a frustrating hostile environment. Supervisors qualify as "Alter Egos".

Protected activity. The misconduct of the alter ego supervisors, combined, clearly give weight to "tangible actions severe and pervasive" to create a hostile environment. The vicarious liability rule applies to unlawful harassment on all covered bases. The rule in Ellerth and Faragher regarding vicarious liability applies to harassment by supervisors based on race, sex (whether or not of a sexual nature), religion, and protected activity. **Consider the EEOC's new guidance** and standard for liability as well as the Army Equal Employment Opportunity Compliance and Complaints admission that the Army made the wrong decision and characterized it as *arbitrary* and contrary to the principles of equity. Plaintiff's requested compensatory and punitive damages through the EEOC. Defendant withheld, until April 15 1999, discovery signed by Navy Captain Miller documenting the conspirator's retaliation in 1997. Withholding this incriminating evidence gave the defendant during District Court Proceedings an unfair advantage. This deterred Plaintiff from presenting his case. The result was that the plaintiff's initial filing was unconvincing and that defendant's argument was accepted without hearing plaintiff's response. It was built on faulty reasoning and on a deposition taken before plaintiff had access to Defendant's discovery. The testimony taken at the deposition is no longer accurate and it was taken under intimidating circumstances, Mr. Guinsberg's presence. The fact this evidence was available since 1997 to one of the state actors (in conspiracy with another) is a significant factor for judgment relief and to reopen this case.

The Navy Captain's whistle blower finding in Complaint 2, Finding 3 page 000027-000028) was:

> **"Had Boswell previously filed a complaint that was a protected nature?" Answer. "Yes". "Was Boswell subsequently subjected to an unfavorable personnel action?" Answer. "Yes." "Did the Colonel know about the IG complaint or protective disclosure?" "Yes". "Was there evidence that Boswell's request would have been withheld by the Colonel had Boswell's IG complaint not been filed?" The investigator answers "there is no other reasonable explanation other than in retaliation".**

Violation of due process. Access to attorney and resources is a right afforded to all service members. Denying plaintiff access to an attorney, attorney resources, and significant documents, documents which carry significant weight on the district court's summary and final judgment, proved to be an effective method to disadvantage plaintiff from acquiring justice within the Court System. Against Army regulations, Plaintiff's supervisor did not forward a request for attorney assistance. The result was violation of due process.

Equity. The V. Boswell, Mroski, Darnell and J.Boswell affidavits illustrate family hardship. Complainant filed an EEOC complaint against one of the defendants on the basis of religion (1 October 1999). Plaintiff Ray Nugent (12/01/99) dropped a $ 13 million District Los Angelos County Law Suit and accepted a $ 150,000 settlement for what the county states was "an unfortunate mistake". TCU alumni states: **"In spite of institutional reprisal, Mr. Boswell continued to serve the military, with reduced rank and income, as a Sergeant in the Texas National Guard."** The difference between performance, entitlements and status between an Army Major and an Army Sergeant is huge. It is certainly a tangible employment action . Although rank has been restored, damage for the rank reduction and the ten years of pain and suffering is attributed to the negligent conduct of TCU.

Higher authority. If the court were to recognize the admission of one of the conspirators, and miracles produced by a higher authority and the startling new evidence, then the court may consider the Mid Cities Pastor's recent comment in a message as credible.

> **"GOD blesses us in the midst of messy circumstances". "All who rage against you will surely be ashamed and disgraced". A Christian song goes: "Stand and see what the Lord will do, in the struggle you face, he will fight for you".** Music CCLI #378016.

Supplemental Affidavit. The Department of the Army reopened the case effective 7 July 1999. The court did not have the expert testimony and investigation of United States Army Lieutenant Colonel, Luther Berry and all (approximately ten) affidavits now available to the court.

> **"It is an honor for the opportunity to provide a personal testimony of former (Major) Mr. James Boswell. While serving as Assisting Inspector General (IG), I had the opportunity to be the first IG to speak with**

then, Major Boswell. What impressed me was the fact he had persisted for over eleven years in seeking justice for a serious wrong involving his candid reporting of alleged sexual improprieties between college cadets and a senior ROTC official. I perceived Major Boswell's allegations as credible. Rarely will the services find a more patriotic and courageous soldier. Strongly recommend reinstatement on active duty with rank and compensation."

Controlling law. The District Court did not have the benefit from The United States Federal Court of Appeals in Louis Caldera, Secretary of the Army v. Northrop Worldwide Aircraft Services INC, (98-1500) decided September 10, 1999. The ruling references the wrongful termination of three plaintiffs employed at will. On September 20, 1991 the jury found for the plaintiffs $ 900,000 in compensation damages and $ 900,000 in punitive damages. The jury verdict on appeal was upheld. The Oklahoma Supreme Court denied certiorari. Intervening events justify vacating the judgment and clearly would have changed the outcome. On 1 March 1999, plaintiff received his first monthly pension check as a result of the Secretary of the Army vacating the discharge. On 25 May 1999 plaintiff received a back pay settlement.

The Supreme Court ruling in West. Department of Veterans Affairs vs Gibson, 14 June 1999 No 98-238 concludes that **42 U.S.C & section 2000e 16 (c)** empowers courts to entertain an action by a complainant still aggrieved after final action.

Defendant's economic motive is identified in TCU's stipulation of facts dated 21 December 1998. It shows receipt of federal funds for $ 6,119,000 for one calendar school year and it is assumed that a similar amount is received annually. **Plaintiff has copies of checks made out to TCU in the amount of $ 2635**, an alibi, the **cadet battalion commander Cadet Warren for $ 500,** to a second alibi, the **Assistant Battalion Commander for $ 429**. These checks serve as economic motive for the Colonel to lure others to participate in the conspiracy. The Cadet Battalion and Deputy commander alibi testimony was crucial. New evidence will show this testimony is not credible. The Colonel was manipulative and powerful. Cadet's fate were controlled by the Colonel and the Sergeant Major. Cadets were very impressionable. Cadets were pressured to following orders. Even if it border lined on perjury, cadets justified that obeying orders was doing the right thing. The assistant battalion commander actually resided with the Sergeant Major. The unauthorized expenditures (payments) were

withdrawn from the cadet fund without cadet consent. The fact these senior cadets received the money is not as disturbing as the fact, that as of Plaintiff's departure, TCU not required to pay the money back. The court record provides exhibits from cadets who complained.

Darnell Affidavit identifies TCU misrepresentation: TCU says Darnell (former Ms Boswell) makes an alibi statement. She did not. This is another factual dispute. She says:

> **"I am sure we could have worked things out had it not been for the unprofessional conduct of TCU and Army supervisors trying to build a case against Jim to cover up from their illegal mismanagement of the ROTC program."**

Violation of the Texas Whistle Blower Act of 1983. When Dean McCracken directed the removal of plaintiff, TCU became subject to wrongful employment acts and violation of the Texas Whistle Blower Act of 1983. Dean McCracken was the administrator in charge of cadet fund oversight, responsibility for the release of cadet money, acceptance of the check to TCU ($2635). He was an accomplice to the violation of **Texas law Title 7 & 32.45** (Fant affidavit). "A fiduciary has a duty to act with candor, unselfishness, and good faith." "A fiduciary relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed." United Teachers v Mackeen and Bailey (94-50503 5th Cir). TCU response to interrogatory 20 states "TCU admits Plaintiff reported to TCU what plaintiff believed to be misapplication of certain funds and property. Further, TCU admits Plaintiff made such reports prior to being transferred from TCU". Dean McCracken memo in the Fant affidavit says "Major Boswell presented me with a record of cadet fund expenditures... Later, that day I examined the cadet fund expenditures. I found no evidence of misuse". Complainant refused to be a part of his supervisors fraudulent actions. The former Dallas ISD superintendent was convicted of the same felony violation. An inference is made that TCU management of the fund was wrong when Plaintiff's supervisors clearly told plaintiff that the management of the student's money, in such an operative manner, is a condition for continued employment at TCU. Request for admission No 4 reads "Prior to Dean McCracken's request to remove Major Boswell from ROTC duty at TCU, Plaintiff provided Dean McCracken with an audit, listing checks that totaled over $ 14,000 of expenditures of which Major Boswell later asserts was a second degree felony, Texas law 32.45 the misapplication of fiduciary n property (plaintiff exhibit

16 page 0004). TCU response is "admit". Production Request NO 7 request audits and inspection of the cadet fund. The fund was placed under the control of the University's comptroller. The IG Report states: "Cadet funds should be strictly used for cadets" "for the soul benefit". The IG stated the Dean was interviewed and the report concludes that the Dean said "It was inappropriate for LTC Stacy to benefit from the fund". Production request NO 22 deals with the sexual assault and alibi statements. The University failed to produce the IG finding and the alibi statements which plaintiff requested. TCU supervisors withheld a copy of the IG report.

Withholding significant and relevant evidence concerning the cadet fund audit, inspection, and comptroller records as well as statements involving sexual assault statements, specifically one which the Darnell affidavit denies ever giving(4 January 2000), provides reasonable probability that TCU has misrepresented or has made serious error of which a jury or 4 members of the Supreme Court will conclude reversal and remand, especially in light of other direct, indirect, and circumstantial evidence of discrimination based on sex, race, anti discrimination law, and protected activity.

Plaintiff shows ripeness for a new suit, and reversal in status for another tangible action, the loss of employment 5 February 1999, the loss of a pay entitlement and family health benefits from 4/12/89 to 2/1/99, attributed to the TCU conspiracy.

Failure to disclose significant findings. TCU shows that the victim volunteered to take a polygraph but failed to disclose that Vyers, Warren and Taylor refused to take polygraphs. TCU's failure to disclose significant findings is reason to adjudicate issues and final action for complainant. The action represents fraud, deceit, bad faith, and intentional discrimination. Had the complainant been armed with this discovery, timely, complainant would have interviewed these alibis and used this evidence and included it in the letters to the special Selection Board for consideration for promotion to Lieutenant Colonel, boards which convened in August of 1998. Darnel affidavit provides another reason for cause of action. Plaintiff discovered on or about 4 January 2000 that one of the conspirators, plaintiff's former supervisor, (a married man employed at TCU), took plaintiff's former wife on a date after he testified at the termination hearing, boasting about the conspiracy.

Darnell affidavit states:

"All I can say is I believe LTC Stacy and TCU had a vendetta for Jim. LTC Stacy called me shortly after he and LTC McCarthy and another TCU employee testified against Jim at the Army Board at Fort Hood. After the board was conducted, Lieutenant Colonel Stacy called me to celebrate and we went on a date. He told me all about the Board and informed me that Jim was kicked out of the Army. He was strange. I suggested that we go to the Tree House in Fort Worth, but he wanted to go to a more private place, like a hotel. His mood was amorous, persistent and aggressive. He kept saying where do you want to go, hoping we would go to a hotel."

The injured party learned after the District Court ruling that the University interviewed Lieutenant Colonel Bright concerning unauthorized control of Army munitions. This situation posed a serious threat to the educational process by threatening the learning environment, and by providing tools to commit bias motivated crimes: A handicapped educational environment leads to a less productive citizenry which affects national economy and in the military, recruitment, retention, and readiness. TCU failed to disclose this investigation. Key to the **42 U.S.C. cause of action (1381 1383)** was evidence about the missing black cadre member who became missing shortly after he agreed to testify in my behalf. The Court is requested to consider legal precedent that when a party fails to disclose evidence, any waiver to an affirmative defense should be waived. Movant has no adequate remedy at law for the wrongful acts of TCU. Barrett v. Secretary of H.&H.S., 840 F. 2d 1259,1263 (6th Cir.1987) Carteret S. & L. Ass'n V. Jackson, 812F.2d 36, 39 n.6 (1st Cir 1987); South mark Prop.v Charles House Corp., 742 F.2d 862, 872 n. 14 (5th Cir.1984). Plaintiff tried to amend the pleadings on 9 February 1999, and tried to appeal the summary and final judgment. It was assumed the USCA would grant relief but it took the USCA until 16 December 1999 to deny the appeal based on lack of jurisdiction. The District Court should take partial responsibility for this mistake and misrepresentation of the court record. The appeals court did not accept the District Court's nor plaintiff's identification of the appeal for summary and final judgment. Yet, for Plaintiff, a pro se litigant, the court's identification was clear in entry 42 of the court record and affirmed through the transmittal of the court record and acceptance of the appeals fee. The court is requested to intervene, correct this error, and hear the appeal or reverse and remand for other proceedings. Plaintiff''s case is based on whistle blowing and different than Brzonkala in the 4th Circuit United States Court of Appeals No 99-5, and (Writ Of

Certiorari To the 4th Circuit of Appeals No 99-5, In the Supreme Court. Fant affidavit illustrates the injustice and TCU Admission NO 18. The admission states: **"Defendant's were not required to have any legal justification or excuse to request Plaintiff's reassignment from TCU"** . This is a disputed material fact. **Plaintiff has shown mistake, misrepresentation, inadvertence, surprise of critical material evidence** and new evidence from key witnesses and controlling principle of law (Harrison v. Boyd, 765 F.2d 501,503 5th Cir. 1984). The final settlement by the Army was justifiable and should have prospective application. In spite of due diligence, prior to the judgment, plaintiff nor the court had access to a final agency settlement action. Numerous intervening events and additional witness testimony substantiate that the adverse party acted in a manner inconsistent with due process of law and violation of anti discrimination law. Several new issues emerged from the supplemental testimony which cause new genuine issues of material fact. These supplementary affidavits are now a part of the record, They clarify the ambiguous and confusing testimony which the defendant and the court relies on. All reasonable inferences are to be in favor of the party against whom summary judgment is sought. (American Flint Glass Workers Un v. Beaumont Glass Co. 62 F.3d 574, 578 (3d Cir. 1995). Plaintiff has previously articulated a plausible basis for the belief that discoverable materials exist which would raise a trial worthy issue. TCU former cadet, Mr. John Hayhurst witnessed the events and submits a sworn affidavit. He graduated and received his commission. He served as an Army Captain and was disgusted with Army policy and resigned. He responds to TCU admission that **"Defendant's were not required to have any legal justification or excuse to request Plaintiff's reassignment from TCU":**

> **"The University was in joint conspiracy with the Army in retaliation for major Boswell going to the IG. I hope my testimony will substantiate the university and the Army reprisal actions, defamation of character against major Boswell and justify award for damages. I felt ... Dean McCracken knew about the slush fund problems, the sexual harassment, the loss of the black cadet and the black cadre member. It appeared to me that Major Boswell was being framed."**

Prayer: That this material was helpful to the understanding of this case.

S: 28 Jul 97

SFMR-RBR - 1st End (14 May 97, Docket Number AC95-08841)
SUBJECT: ABCMR Proceedings

HQDA, OASA, Arlington, Virginia 22202-4508 21 May 97

TO: Commander, US Army Reserve Personnel Center,
ATTN: ARPC-VSA-A, St. Louis, Missouri 63132-5200

1. Under the authority of Title 10, United States Code, section 1552, the recommendation of the Army Board for Correction of Military Records is hereby approved, and it is directed that all of the Department of the Army records of the individual concerned be corrected as shown under Recommendation in the Proceedings of the Board in this case.

2. Request necessary administrative action be taken to effect the correction of records as indicated no later than 28 July 1997. Further, request that the individual concerned and counsel, if any, as well as any members of Congress who have shown interest be advised of the correction and that the Board for Correction of Military Records be furnished a copy of the correspondence.

3. Furnish the Defense Finance and Accounting Service-Denver Center, ATTN: Claims Branch - FYDEC, 6760 East Irvington Place, Denver, CO 80279-7000, a copy of your letter of notification to the individual concerned so that settlement of any monies due may be accomplished.

BY ORDER OF THE SECRETARY OF THE ARMY:

signed Karl F. Schneider
Karl F. Schneider
Acting Director

Encls

CF:
Applicant
Counsel

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7. In view of the foregoing, it would be appropriate to correct the applicant's records, but only as recommended below.

RECOMMENDATION:

1. That all of the Department of the Army records related to this case be corrected:

a. by removing from the OMPF of the individual concerned the OER for the period ending January 1987 and all documents related thereto;

b. by placement of an appropriate nonprejudicial statement explaining the absence of the aforementioned OER in his record; and

c. upon implementation of the foregoing, by submitting his records to duly constituted special selection boards for promotion consideration to the rank of lieutenant colonel and, if appropriate, to the rank of colonel.

2. That upon completion of the action by the special selection boards, one of the following will occur:

a. if selected for promotion, correct his military records to show that the action discharging him from the Army on 12 April 1989 is void and of no force or effect, and that he be reinstated on active duty; or

b. if not selected for promotion, correct his military records to show that the action discharging him from the Army on 12 April 1989 is void and of no force or effect, and that he was retired from the Regular Army, as a Major/04, upon completion of 20 years active military service.

3. That in accordance with paragraph 21e, Army Regulation 15-185, following completion of the administrative corrections directed herein, the proceedings of the Board and all documents related to this appeal be returned to this Board for permanent filing.

4. That so much of the application as is in excess of the foregoing be denied.

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BOARD VOTE:

[illegible] [illegible] [illegible] GRANT AS STATED IN RECOMMENDATION

_____ _____ _____ GRANT FORMAL HEARING

_____ _____ _____ DENY APPLICATION

James E. Lucas
CHAIRPERSON

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I-22

United States of America

DEPARTMENT OF THE ARMY

Washington DC (PLACE) 21 April 1998 (DATE)

I HEREBY CERTIFY that the attached is a true and exact copy of records provided by the Army Board for Correction of Military Records pertaining to JOSWELL, 459-92-2709 a former member of the United States Army. The original files are in the temporary custody of the Military Personnel Branch, Litigation Division, Office of the Judge Advocate General.

TERRY L. ELLING
Lieutenant Colonel, U.S. Army
Chief, Military Personnel Branch

I HEREBY CERTIFY that Lieutenant Colonel Terry L. Elling, who signed the foregoing certificate, is Chief, Military Personnel Branch, Litigation Division, Office of the Judge Advocate General of the Army, and that full faith and credit are due to his certification.

IN TESTIMONY WHEREOF I, Joel B. Hudson
The Administrative Assistant to the Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed this 21st day of April 1998

By [redacted]
Chief, Litigation Division

DA FORM [illegible] EB EDITION OF 1 MAR 66 IS OBSOLETE USAPA 1.00

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GOVERNMENT EXHIBIT A

I-23

BEST AVAILABLE COPY

No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES DOUGLAS BOSWELL PETITIONER
VS
TEXAS CHRISTIAN UNIVERSITY RESPONDENTS
WILLIAM E. TUCKER, DR CHANCELLOR
MICHAEL D. MCCRACKEN DEAN,

Proof of Service

I, James D, Boswell, do declare that on this date, June 12, 2000 as required by the Supreme Court Rule 29 I have served the enclosed **PETITION FOR A WRIT OF CERTIORARI** on each party to the above proceeding or that party's counsel by certified mail, return receipt requested, and priority mail.

The name of the counsel served is: Richard De Berry, McDonald and Sanders, 1300 Continental Plaza, 777 Main Street, Ft Worth Texas 76102.

I declare under penalty of perjury that the foregoing is true and correct.

James Boswell

James Douglas Boswell, Pro Se
414 Morrison Dr.
Euless TX 76039
817 358 9911

NATALIE R. VAUGHAN
Notary Public, State of Texas
My Commission Expires 10-13-02

Subscribed and sworn to before me by said affiant, a notary public in and for Tarrant County, Texas, this 12th day of June 2000.

Natalie R. Vaughan

My commission expires: 10-13-02

Notary Public for the State of Texas
County of TARRANT